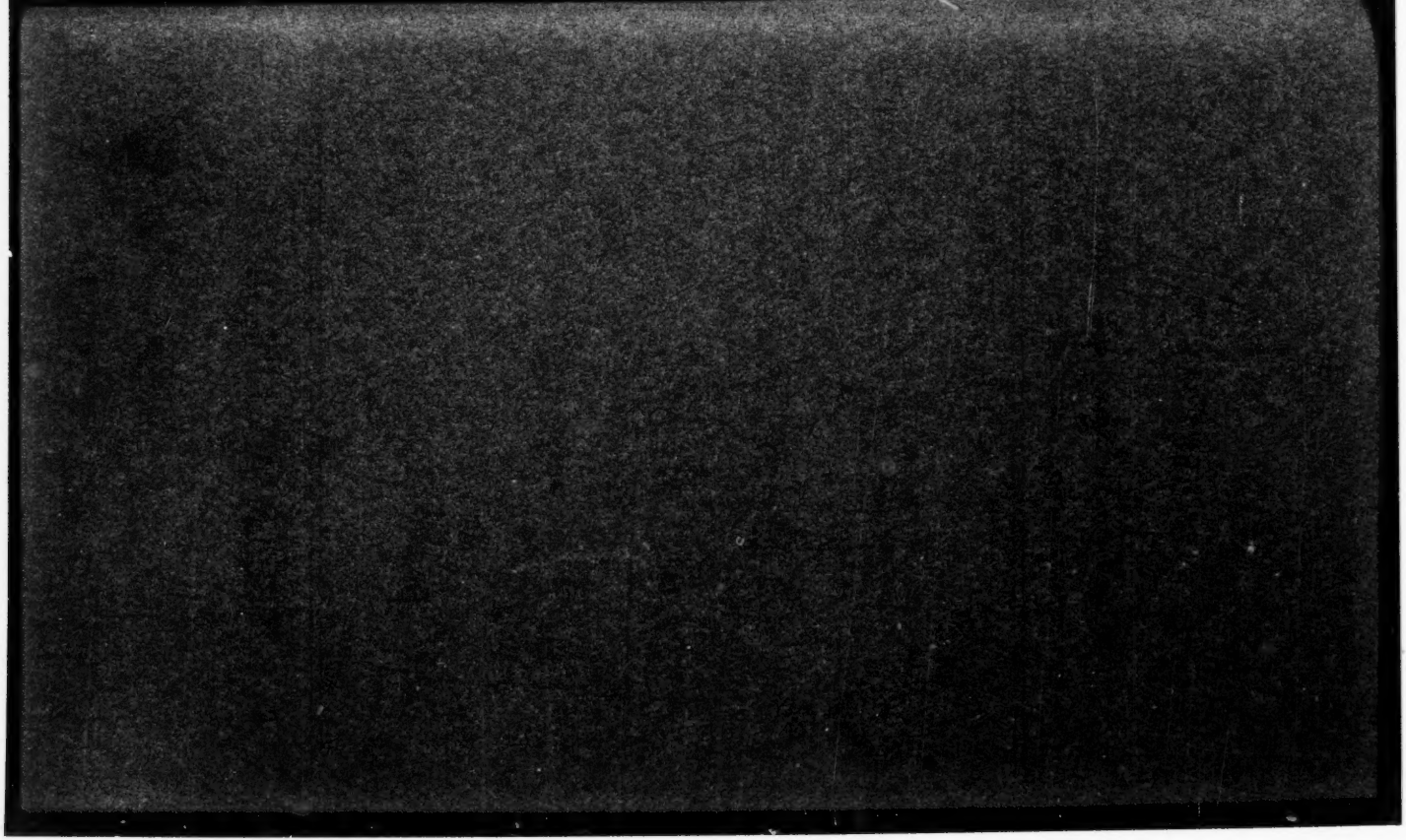

(29,568)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 306.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MARTIN KIRKENDALL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF OHIO.

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1 STATE OF OHIO,
County of Cuyahoga,
City of Cleveland, ss:

IN THE MUNICIPAL COURT OF CLEVELAND.

No. 158,240.

MARTIN KIRKENDALL, Plaintiff,

vs.

THE ERIE RAILROAD COMPANY, Defendant.

DEFENDANT'S BILL OF EXCEPTIONS.

Appearances: On behalf of Plaintiff: Messrs. Gott, Chamberlain & Bloomfield; D. K. Henderson, Esq., of counsel. On behalf of Defendant: Messrs. Cook, McGowan, Foote, Bushnell & Lamb; R. C. Wheeler, Esq., of counsel.

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3 [Title Omitted.]

Be it remembered, That at the October, A. D. 1921, term of said Court, to-wit, Monday morning, December 5, 1921, this cause came on to be heard, in Court Room No. 4 of said Court, before the Hon. Walter McMahon, one of the Judges of said Court, and a jury.

Thereupon, a jury being duly empanelled and sworn, the cause was stated to the jury on behalf of plaintiff by D. K. Hender-
4 son, Esq., and on behalf of defendant by R. C. Wheeler, Esq.

Thereupon the following proceedings were had:

Plaintiff's Case.

5 Thereupon the plaintiff, MARTIN KIRKENDALL, to maintain the issues on his part to be maintained, offered himself as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination of Martin Kirkendall.

By Mr. Henderson:

Q. What is your name?
A. Martin L. Kirkendall.
Q. Where do you live?
A. 4020 Bridge Avenue.
Q. How long have you lived down on Bridge Avenue there?
A. About one year.
Q. Where are you employed?
A. Bradstreet Company.
Q. In what capacity?
A. As a reporter.
Q. Prior to this where did you live? Prior to living on Bridge Avenue?
A. Why, we had rooms——

The Court: Speak up loud so this last man over here can hear you.

6 A. We had rooms out on Lorain Avenue near 45th I think.
Q. And prior to coming to Cleveland where did you live?
A. Corning, New York.
Q. Were you employed there?
A. Yes, sir.
Q. In what capacity?
A. I was employed by the Corning Glass Works.
Q. What doing?

A. Manufacturing electric light bulbs.

Q. Now about what time was it that you moved from Corning, New York, to Cleveland?

A. About the 18th of September.

Q. Nineteen——

A. 1920.

Q. Now when you moved from Corning to Cleveland, did you bring your furniture and the rest of your things down here?

A. Part of them.

Q. Now did you pack miscellaneous articles, including all your little things in different boxes?

A. Yes, sir.

Q. Done that about the 18th of September?

A. About that. About the week prior, about——

Q. Yes.

A. The week of the 18th.

Q. Now referring directly to this controversy, did you go to
7 the railroad station in Corning, New York, to deliver to the railroad company any boxes of articles of any kind?

A. Yes, sir.

Q. What boxes or articles were those?

A. They were two boxes and one barrel.

Q. What did the barrel contain?

A. Canned fruit.

Q. And the other? The second, billed as a box?

A. Two feather pillows.

The Court: Two what?

Witness: Feather pillows.

Mr. Henderson: Talk out loud so the court and jury can hear you.

Witness: Two feather pillows.

Q. And what was—what did the third box contain?

A. Miscellaneous articles. Household articles.

Q. Now right here I wish you would tell the jury what the transaction was, from the time you brought the three boxes—or the two boxes and the barrel, down to the freight station there, and what conversation you had, if any, with the agent?

A. Why——

Mr. Wheeler: I object to the conversation with the agent. It is immaterial, the conversation he had with the agent.

8 (Argument had.)

The Court: Well, overruled.

Mr. Wheeler: Exception.

Q. Will you please tell the jury what the situation and the conversation was?

A. Why, I took the boxes and barrel to the freight station, told them that I wanted them billed to Cleveland, Ohio. He asked me what they contained. I told him that the barrel contained canned

fruit, that the small box contained two pillows, that the large box was miscellaneous household articles, together with two quilts and two pair woolen blankets.

Q. Did he ask you at that time anything about miscellaneous article or what you meant by miscellaneous articles?

A. Yes.

Q. What did you tell him?

A. I told him they were household articles. He says "Well, I will bill them as bedding."

Q. That was—did he say anything about paying for them?

A. No.

Q. Did you ask him?

A. Yes.

Q. And what did he say?

Mr. Wheeler: I object.

The Court: Yes, it is just a little leading. Let him tell the
9 conversation, then after you have exhausted him then you can lead him. Relate the conversation that took place there.

Witness: I told him I would pay for the freight at Corning, but he says I could just as well pay for them at Cleveland.

Q. Did you, at that time, sign your name to anything?

A. Yes, sir.

Q. Do you know what that was?

A. A bill of lading.

Q. Did he weigh them while you were there?

A. I think he did.

Q. Altogether, how long did you talk to him?

A. Well, I probably was there five minutes

Q. Did you see him make out the bill of lading?

A. No.

Q. When you came to sign your name, what if anything was said?

A. Why, I was in a hurry; he went into the office and came back with a bill of lading, says "sign here" and I signed and left immediately.

Q. Refreshing your recollection, did you go into detail in telling him that some of the goods contained in those boxes were aluminum articles and so forth?

A. Yes.

Q. He asked you that?

A. I told him. Aluminum goods, and so forth.

10 Q. Now when you came to Cleveland did you go down to the railroad station here?

A. Yes, sir.

Q. And had they sent out any notices to you?

A. Yes, sir.

Mr. Wheeler: I don't see why this is material.

The Court: Admitted.

Mr. Wheeler: We admitted all of that.

The Court: All admitted. Why introduce it?
Mr. Henderson: Well, I want this read, if the court please.

Q. When did you receive that notice?

Mr. Wheeler: I object to it.
The Court: Oh, I don't see the importance of it. They admit sending notice and they admit losing the box.
Mr. Henderson: Well, if the Court please on this notice it says "Please call at the office and get one box of bedding, one barrel canned fruit, one box of do." and so forth, sending him notice that the three of them were there, when only two of them arrived.
The Court: Well, that may be. The notice would speak for itself.
Mr. Wheeler: Just introduce it.
11 Mr. Henderson: I introduce it then in evidence. Plaintiff's Exhibit 1.

(The same is offered and admitted in evidence, and is attached hereto and made a part of this bill of exceptions.)

The Court: They admit receiving the goods, admit carrying them, admit that they lost a package—I don't say that they admit they lost a package but they admit they didn't deliver a certain package.

Q. Now do you know what articles were in that box?

The Court: Now you mean the lost box?
Q. The lost box?
The Court: All right. Box that wasn't delivered.
Mr. Henderson: That is the one I am referring to, yes.

A. Why, we had an invoice—we have an invoice of the articles missing.
Q. Could you recall from your memory at this time the list of articles that were missing?
A. Why, in part.
Q. I will ask you to call off—or will you allow me to——

Mr. Wheeler: Use your list, if you want to.

Q. I show you a list and ask you if that—when that list was made out?

12 The Court: Better identify your papers here. The first one, better mark it Plaintiff's Exhibit 1.
Mr. Henderson: Yes.
The Court: Handing witness Exhibit 2 for identification.

Q. When was that list made out?
A. Why, that list I believe was made out soon after we was notified of the shortage.
Q. And for what purpose was it made out?
A. The company wanted to—wanted an invoice of the contents of the box.
Q. Yes.

A. So my wife——

Q. For what? Did they state to you what purpose they had in asking for that?

A. No.

Q. Or their reason?

A. No.

Q. Who made that list out?

A. My wife—Mrs. Kirkendall.

Q. Did you see her write it?

A. Yes, sir.

Q. Just read to the jury the articles that were lost there? Well now, in order to save time, when you come to each article, I will ask you if you know the value or first I will ask you if you know

13 the value of those articles?

A. Do you wish me to read those off?

Q. Yes, but first, do you know the value of the different articles there?

A. One chafing dish——

The Court: No, no, listen to the question.

Q. No, just answer me "yes" or "no." Do you know the value of them?

A. Yes.

Q. Now will you read the different articles that were lost and state your opinion of their value?

A. Do you wish me to read this?

Q. Yes.

A. One chafing dish——

Q. What is the value of that?

A. Fifteen dollars. One casserole, five dollars. One pair blankets, eight dollars. One dust mop, $1.50. One carpet sweeper, five dollars. One broom, one dollar. Photographs, twenty-five dollars. Two quilts, sixteen dollars. One pair hip boots, ten dollars. One fishing basket, five dollars. One steel rod, reel and line, five dollars. One clothes basket, three dollars. One gas oven, five dollars. One box of millinery supplies, fifteen dollars. Six pairs of curtains, twenty dollars. Clothing, twenty-five dollars.

Q. What clothing was that, do you know?

14 A. I don't recollect what they was.

Q. All right.

A. And one silver smoking set, ten dollars. One nut bowl, three dollars. One fern dish, five dollars. One piece of statuary, two dollars. One ice cream freezer, five dollars. One bed spread, five dollars. One pair of ice skates, two dollars. One hand embroidered lunch cloth, fifteen dollars. One leather sample case, ten dollars. One Pyrex pie dish, two dollars. One Pyrex baking dish, three dollars. Aluminum kettle with a steamer, three dollars—ten dollars, rather. Three aluminum kettles, seven dollars. One aluminum combination roaster, ten dollars. One aluminum coffee pot, eight dollars. One aluminum frying pan, seven dollars. One aluminum

kettle with steamer, ten dollars. Two bibles, at $2.50 per, five dollars. One book, leather cover, five dollars. Another book, leather cover, one dollar. Three books, $4.50. One lady's hat, five dollars. One lady's black hat, with flowers, ten dollars. One lady's navy sailor hat, five dollars. One lady's white Milan hat, eight dollars. One lady's braid hat, seven dollars. One lady's brown velvet hat, ten dollars. One lady's taupe hat, five dollars. One lady's light brown hat, ten dollars. One lady's hat brim, five dollars. One man's panama hat, six dollars. Total, three hundred sixty-five dollars.

Q. Were there any articles after you made out that list that weren't included?

15 A. Several other small articles were found later to——

Q. How many times——

Mr. Wheeler: I object to that.

Mr. Henderson: Why so?

Mr. Wheeler: Because they sued for this.

Mr. Henderson: No, we haven't sued for that.

The Court: Nothing specified. Statement of claim doesn't give any itemized statement whatsoever. No motion was filed.

Q. And how many times did you go down to the railroad company? Since you have been in Cleveland, trying to locate your goods?

Mr. Wheeler: I object to that.

The Court: Oh that doesn't help us any.

Mr. Henderson: Well, withdraw the question.

Q. How did you arrive at the values there that you have read off?

A. Well, on the first cost of the articles.

Q. Do you mean that the articles that you read off there—was what they cost or——

A. No, what we—no, not what they cost. Some of these articles cost a whole lot more than the value that we placed on them at that time.

Mr. Henderson: I think that is all.

16 Cross-examination of Martin Kirkendall.

By Mr. Wheeler:

Q. You say that when you went to the station at Corning you signed some paper, a bill of lading?

A. Yes.

Q. And the bill of lading said "one box of bedding, one barrel of canned fruit, and one box of canned fruit, I guess?

A. Pillows.

Q. Just one box—yes, that is what was on that bill of lading?

A. Yes.

Q. And you signed that bill of lading didn't you?

A. Yes, I signed the bill of lading.
Q. Yes. Now what—your barrel of canned fruit, how much did that weigh?
A. Oh, I don't know. It was pretty heavy. It was a sugar barrel, packed with canned fruit. It was quite heavy.
Q. And how large a box was this box which you describe as a box of bedding?

Mr. Henderson: I object to that.

Q. Which was lost?

The Court: Oh no, it is for the jury to determine how the property goes in here.

Mr. Henderson: I object to the form of the question, "de-
17 scribed as a box of bedding." We claim he did not describe it as a box of bedding.

The Court: Oh well, just describe the boxes shown on the bill of lading.
Mr. Henderson: Box of bedding——
The Court: Overruled.
Mr. Wheeler: That is what I mean.
Mr. Henderson: You didn't say that.

A. It was a large, square box, possibly three and a half or four feet high, and possibly five and a half or six feet long, and possibly four and a half or five feet wide—large packing case.
Q. Did you see the agent weigh the box at Corning?
A. I think he weighed it while I was there.
Q. Do you know how much it weighed?
A. Why, I do since—yes. At the time I didn't pay any attention.
Q. How much did it weigh?
A. I think it weighed about two hundred eighty pounds, if I remember right.

Mr. Wheeler: Oh, I think that is all.
The Court: That is all.
Mr. Henderson: Just one more question.

18 Redirect examination of Martin Kirkendall.

By Mr. Henderson:

Q. You stated that at the time the boxes were weighed you didn't notice what their weight was?
A. No, I didn't notice. I didn't pay much attention to the weights.
Q. Did you, at the time you signed the bill of lading, notice what the agent had written on it?

Mr. Wheeler: I object to that.
The Court: Yes. Sustained.

Q. When you went to the railroad station, to—in answer to your notice, do you know how much you paid for the freight rate?
A. I think it was about four dollars. Around four dollars.
Q. Now was that four dollars and something for the two boxes that you got?
A. No, for the three.
Q. Would they deliver the two boxes without the payment of the freight rate for all three?
A. No.

Mr. Wheeler: I object to that.
Mr. Henderson: That is all.
The Court: Well I don't see its importance, at all. Objection overruled.
19 Mr. Wheeler: Exception.

(Witness excused.)

Mr. Henderson: Call Mrs. Kirkendall.

20 Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness one LELA KIRKENDALL, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Lela Kirkendall.

By Mr. Henderson:

Q. Now what is your name?
A. Lela Kirkendall.

The Court: Speak up, lady, now, I can't hear you and that man is three times the distance away from you.
Witness: Lela Kirkendall.

Q. You are the wife of the plaintiff here?
A. Yes, sir.
Q. Referring directly to this controversy, you heard Mr. Kirkendall read off the list of plaintiff's exhibit?
A. Yes, I did.
Q. And you are familiar with the articles on that list?
A. Yes.
Q. Is that your hand writing?
A. It is.
Q. And the amounts arrived at and the statements—you can take that—set opposite the articles listed, is that the reasonable valuation?
21 A. Yes.
Q. Of the different articles?
A. Yes.

Q. On what do you base your opinion as to their value?

A. Well, owing to the fact that I have had quite a little experience in buying most of those articles, I have always bought them, have had to replace them since, of couse. And continue buying them.

Q. The different articles that he read off, is that the reasonable value of those articles?

A. I think it is.

Q. By that do you mean that to replace them would cost that item? The items set opposite the articles?

A. No, I couldn't replace them for this.

Q. What does that total, then?

A. The total amount here? Three hundred sixty-five dollars.

Q. Were there any other articles missing, that were packed in that box and which you did not put on that list?

A. Yes.

Q. What articles were they?

A. Well, I had a very fine pair of new pillow slips, hand made pillow slips, very fine work, and they had never been used.

Mr. Wheeler: I didn't get that last?

22 The Court: A little louder.

Witness: Pillow slips.

Mr. Wheeler: One pair?

Witness: Yes. Entirely new. Had never been used. Hand made. Hand work on them. Also a dozen pillow tops—sofa pillow tops, new ones that had never been used. About a dozen of those.

Q. Were there any miscellaneous other articles that were——

A. There were several other small kitchen miscellaneous articles, for instance we had the contents of our medicine cabinet in one of the kettles which was never listed. All those little small items that we didn't think worth while.

Mr. Henderson: That is all.

Cross-examination of Lela Kirkendall.

By Mr. Wheeler:

Q. Mrs. Kirkendall, the first item on your list is one chafing dish, value fifteen dollars. How long had you had that chafing dish?

A. How long had we had it, at the time?

Q. Yes.

23 A. Oh I should judge couple of years or so.

Q. What did you pay for it, originally?

A. That is what we paid for it.

Q. Fifteen dollars? Next one is one caser-ol- five dollars. How long had you had that?

A. I couldn't say.

Q. And do you know what you paid for it?

A. No.

Q. The next is one pair of blankets. How long had you had them?

A. One pair of blankets that I had probably four or five years and had never used them because I was very choice of them. They were very good blankets. They had probably never been used only once or twice. Never been washed.

Q. What did you pay for them?

A. The price invoiced.

Q. Eight dollars? One dust mop, how long had you had that?

A. I couldn't say.

Q. How much did you pay——

The Court: Oh about how long? You must give this jury some idea what these articles cost and how long you had had the use of them. Do you know whether you had it a day or week or a month?

24 Witness: Well, I probably had had the dust mop a couple of months.

Q. About two months? What did you pay for that?

A. Dollar fifty cents.

Q. Same price? One carpet sweeper, five dollars. How long had you had that?

A. About a year.

Q. And what did you pay for that?

A. The carpet sweeper was a gift.

Q. A gift?

The Court: Well, how do you arrive at this value, Mrs. Kirkendall?

Witness: Because I have priced carpet sweepers and I know about what the values of carpet swepers are. I know what the make of that carpet sweeper was and about what they are worth. It was——

The Court: Do you know what the cost price was?

Witness: I don't know the cost price of that particular carpet sweeper.

The Court: Well, one like it?

Witness: Yes.

The Court: Well, how much?

Witness: About the same as it is listed.

The Court: Same as this is listed?

25 Mr. Wheeler: Five dollars.

The Court: You see we want to get an idea how you placed a value on these things.

Q. The next item is one broom—well, we will pass that. Withdraw that question. The next item, photographs, twenty-five dollars. What were those photographs?

A. The photographs included regular photographs that we had collected of people—had of our friends for years, and also two books containing kodak pictures—all the kodak pictures that I had. Had

taken pictures for years, had a great many kodak pictures—films and things of that kind.

Q. Well, how did you arrive at twenty-five dollars?

A. Well, of course that would be a thing that would be very hard to arrive at a definite value on, although if I should consider what the prints and the developing of the pictures cost me and how much a dozen each picture would be, I think it would far more than the value that was put on them, but the value that is put on them of course is not any value to us because those are things that money can't replace.

Q. The next item, two quilts, sixteen dollars. How long had you had the quilts?

A. Oh, possibly a year or so.

26 Q. And what did they cost you, originally?

Mr. Henderson: If you don't know, just tell the best of your recollection.

A. Well, the quilts were hand made quilts. It would be very hard to state what the—I couldn't tell what the cost of them would be.

Q. Cost to you?

A. No, they were made. They were hand made quilts. They weren't bought at stores.

Q. Did you buy them from anybody?

A. The materials were bought and they were made.

Q. Next item is one pair of hip boots. How long had you had those?

The Court: I suppose the man could answer that better than she could. Might ask him.

Mr. Wheeler: Shall I ask him now?

The Court: Yes.

Mr. Wheeler: How long had you had those, Mr. Kirkendall?

Mr. Kirkendall: Oh I probably had them about a month. Wore them twice, I believe.

Mr. Wheeler: And what did it cost you?

Mr. Kirkendall: Twelve dollars.

Mr. Wheeler: Well, I will skip over some of these smaller

27 items.

Q. Another item is one box of millinery supplies, fifteen dollars. What was in that box?

A. Velvets and various hat trimmings.

Q. How much velvet and how much various hat trimmings? How do you arrive at fifteen dollars? That is what I am trying to find out.

A. Because I—I simply made out the list at just what they were. Just what the cost of them was. They were new, entirely new things.

Q. Another item, six pair curtains, twenty dollars. How long had you had the curtains?

A. Oh, two pairs of them I think I had were practically new. The other pairs I probably had for a year or so.

Q. And what did they cost you, originally?

A. The new curtains cost me—the two new curtains cost me six dollars a pair. The other old curtains, I don't remember, because I hadn't bought those recently.

Q. Well, how did you arrive at twenty dollars? Do you know how you—how did you——

A. What do you mean?

Q. How did you arrive at twenty dollars as being the value of those curtains?

A. Why just about—just what I estimated they would be worth. That is very little I found, since I tried to replace them.

28 Q. Well, you mean you guessed at it? Is that it? Had no basis? Well, the next is clothing, twenty-five dollars. What clothing is that?

A. There was included in the clothing a coat and dress and a skirt. They were not new.

Q. How long had you had them?

A. The dress I probably had had a year or so. The coat was two or three years old. The skirt I can't say, exactly.

Q. What was the—you say you had the coat about a year or so?

A. No, I had had the coat longer than that. The dress I had had about a year.

Q. Oh yes. Do you know how much you paid for the coat, originally?

A. At the time the coat was bought I paid twenty-five dollars for it.

Q. The next item is one silver smoking set. How long had you had that?

A. Oh, had that several years.

Q. Do you know what the original cost was?

A. Fifteen dollars.

Q. Another item is one ice cream freezer, five dollars, I think it is. How long had you had that?

A. Oh, a couple of years.

Q. Do you know what the original price of that was?

29 A. I don't remember exactly. I think it was seven or eight dollars.

Q. How large a creamer was it? Or freezer, was it?

A. Two quart freezer.

Q. Two quart? The next item is one bed spread, five dollars. How long had you had that?

A. The bed spread, I had had it two or three months.

Q. Do you know what you paid for it?

A. I paid five dollars.

Q. Same price?

A. Yes.

Q. Next is one pair of ice skates, two dollars.

A. This belongs to my husband.

Q. Do you know how long he had had them?
A. No, I don't.

The Court: Might ask.
Mr. Wheeler: How long had you had them, Mr. Kirkendall?
Mr. Kirkendall: Oh I had had them several years. I never had used them.
Mr. Wheeler: What did you pay for them?
Mr. Kirkendall: I think they were four or five dollars, if I remember right. I don't remember just exactly the amount that I paid for them.

30 Q. Next is one hand embroidered lunch cloth, fifteen dollars. How long had you had that?
A. Since I had bought it, before it was made, I had it a good many years but I was a long time making it. I was a good many years, making it. It probably hadn't been finished over two or three years. It was very large and a great deal of work on it.
Q. What did that cost you?

Mr. Henderson: She just said she made it. She didn't buy it.

A. Oh I bought the material. I can't—you couldn't figure very well just what the material cost on a hand embroidered lunch cloth.
Q. Well, did it cost a dollar or fifteen? Give us some idea? I just wanted to know——
A. Do you just want to figure the cloth or the cost of the material or my time? Is that worth anything?
Q. What is the cost of the material?
A. Probably the cost of the material wasn't over a dollar.
Q. Oh yes.
A. To two dollars, perhaps, I couldn't tell.
Q. Next item one leather sample case. Does that belong to your husband?
A. Yes.

31 Mr. Wheeler: How long had you had that, Mr. Kirkendall?
Mr. Kirkendall: I had it a couple years.
Mr. Wheeler: Do you know what you paid for that?
Mr. Kirkendall: Eight dollars fifty cents.

Q. Next is one Pyrex pie dish, two dollars. How long had you had that?
A. Just a short time. Couple months.
Q. What did you pay for that?
A. I think both those Pyrex dishes are listed at what they cost—cost us.
Q. Next is one aluminum tea kettle with steamer, ten dollars. How long had you had that?
A. Same time.
Q. And do you know what you paid for it?
A. I think about twelve dollars.

Q. Next, three aluminum kettles, seven dollars. How long had you had them?

A. Had those—about the same length of time of those pyrex.

Q. Do you know what you paid for that? Or for them?

A. Which article did you mean?

Q. The three aluminum kettles?

A. Oh yes. Ten dollars, I think.

32 Q. Combination roaster, what did you pay for that?

A. Fifteen dollars.

Q. Coffee pot?

A. Eight dollars.

Q. Frying pan?

A. Eight dollars.

Q. Kettle with steamer?

A. Twelve dollars.

Q. Had two kettles with steamer?

A. One kettle with steamer—do you mean the tea kettle at the top?

Q. Oh yes.

A. Tea kettle with steamer, and kettle with steamer.

Q. Paid twelve dollars for those?

A. Yes.

Q. You have one book, leather cover, five dollars. What kind of a book was that?

A. A leather bound book of Whittier's Poems. Not bound—leather bound entirely.

Q. How long had you had it?

A. Just a few months.

Q. And what did you pay for it?

A. It was a gift.

Q. I see; there is three books, four dollars and a half. What books were those?

33 A. Those were popular novels. Cloth bound books. Cloth books.

Q. And how long had you had them?

A. I couldn't say. They had been bought within a year.

Q. Do you know what you paid for them?

A. Oh, I couldn't tell just each book, separately. I know at the time I made the least figure that—I figured to list them at about what they cost.

Q. Cost you a dollar and a half apiece?

A. I think so.

Q. The next item is one lady's hat, five dollars. How long had you had that hat?

A. All of the hats listed have been bought within probalby a year. They were both summer and winter hats, for the two seasons preceding.

Q. Yes. How much did you pay for the hat? The first one?

A. I don't remember just what I paid for that one.

Q. Do you know what you paid for any of the hats? Nine hats? Do you know what you paid for any of the nine?

A. Well I couldn't say to a penny. I know that I—I figured the hats at about what the hats cost me and I am in the—was in the business and I figured the hats at wholesale prices.

Q. Do you mean that these hats were for sale?

A. No, sir, they were my personal hats.

34 Q. You bought them all within the year, you say?

A. Yes.

The Court: Had you been a milliner?

Witness: Yes, sir.

Q. And the prices that you have quoted here are the cost prices to you?

A. Yes.

Mr. Wheeler: I think that is all.

Mr. Henderson: Just a minute.

Redirect examination of Lela Kirkendall.

By Mr. Henderson:

Q. Some of these articles you stated had been purchased several years ago?

A. A few of them, yes.

Q. Now have you been familiar with the conditions in market values of these different articles during the past few years?

A. Yes, I have.

Q. Has the price advanced any on articles—some of which were purchased years ago—compared to what you could replace them for?

A. They certainly have.

Q. Then the—some of the items listed here were not—

35 would not be what they would cost to replace them now?

A. They would not.

Mr. Henderson: That is all.

(Witness excused.)

The Court: Call your next.

Mr. Henderson: That is all. We rest.

Thereupon the plaintiff rested.

36 **Colloquy Between Court and Counsel.**

Mr. Wheeler: Your Honor, I would like to make a motion at this time.

The Court: Argue in the absence of the jury?

Mr. Wheeler: Yes, please.

The Court: You will be excused for a moment. Bear in mind the usual caution. This looks like an old jury I have had here, Attorneys want to argue a motion. Don't get very far away.

(Jury retires.)

Mr. Wheeler: Your Honor please, I would like to make a motion at this time to instruct the jury to return a verdict for defendant, on the ground that the plaintiff is not entitled to recover as a matter of law.

(Argument had.)

Mr. Wheeler: I believe I am a little premature in my motion, your Honor, because we haven't proved the tariff.

The Court: Yes, the only thing before the court now is the fact that they delivered some goods——

Mr. Wheeler: That's right.

The Court: Which were not delivered, and they proved the value.

37 Mr. Wheeler: I will have to withdraw my motion at this time.

The Court: That is the only evidence we have, which makes and establishes a prima facie case. Defendant admits that they did not deliver the property.

Mr. Wheeler: That's right. Well, I will withdraw the motion.

(Argument had.)

The Court: Proceed with the defense. Let the record show the motion withdrawn.

(Jury returns to jury box.)

Defendant's Case.

38 Thereupon the Defendant, to maintain the issues on its part to be maintained, called as a witness one JOHN DURKIN, who, having been first duly sworn, was examined and testified as follows:

Direct examination of John Durkin.

By Mr. Wheeler:

Q. What is your full name, Mr. Durkin?
A. John Durkin.
Q. And where do you live?
A. Corning, New York.
Q. And what is your occupation?
A. Freight handler.
Q. And what was your occupation on September 18, 1920?
A. Freight receiving and delivery clerk.
Q. At Corning, New York?
A. Corning, New York.
Q. Do you recall the occasion when this plaintiff shipped some goods from Corning to Cleveland?
A. Why yes, I remember him.

Q. Do you recall what the shipment was?

A. Just what the bill of lading cites—clothing and canned fruits—or bedding and canned fruit rather, I think it was. I have a copy of the shipping order that he signed.

39 Q. Who made out the bill of lading?

A. I did.

Q. Who—did he give you the information on which you made the bill of lading?

A. Certainly, yes.

Q. And did he tell you that he had—that there was one box of bedding, one barrel of canned fruit, and one box?

A. Yes, sir.

Q. Did he tell you anything else in reference to this shipment?

A. No.

Q. Did he tell you that the box of bedding contained an ice cream freezer?

A. No, he did not.

Q. Or chafing dish?

A. No.

Mr. Henderson: I object to these leading questions.

The Court: Yes, let him tell what was said and then you can rebut it afterwards perhaps if you wish or——

Mr. Wheeler: All right.

The Court: —or you can put it right direct as Mr. Kirkendall—Mr. Kirkendall has testified himself to a certain conversation

40 you had, now you may put that right direct to rebut it and then ask what other conversation was had, if any.

Q. Did Mr. Kirkendall tell you that these articles contained anything other than is shown on the face of the bill of lading?

A. That's all.

Q. Did you have any conversation with him about the contents of these boxes?

A. I don't remember having had anything at all. I don't remember of having had anything at all. Just billed it right out as he gave them to me.

Q. Now how did you arrive at the rate? Freight rate?

A. Well I don't—I don't do that. That goes to the rate clerk. All I do is give the articles and weight.

Q. You don't know anything about the rate?

A. No.

Q. Did you weigh the goods?

A. Yes, sir.

Q. And marked on the bill of lading the weight?

A. Yes, sir.

Q. And did Mr. Kirkendall sign the bill of lading?

A. Yes, sir.

Q. And you signed it also?

A. Yes, sir.

Q. Delivered to him the original I suppose?

41 A. Gave him the straight bill of lading and I kept the shipping order.

Q. Yes, sir.

A. And he also had a memorandum of it.

Mr. Wheeler: I think that's all.

Cross-examination of John Durkin.

By Mr. Henderson:

Q. I didn't get your name?

A. John Durkin.

Q. D-u-r-k-i-n?

A. D-u-r-k-i-n.

Q. You are still working for the Erie railroad?

A. Yes, sir.

Q. As what? Freight agent at Corning, New York?

A. No, as freight handler.

Q. Freight handler?

A. Yes, sir.

Q. You are not the agent?

A. No, sir.

Q. You were working there at that time?

A. Yes, sir.

42 Q. Do you recall of Mr. Kirkendall coming down there this day and telling you that he wanted to ship out some goods?

A. Why, I don't recall just the circumstances. When he come there the goods—whether he came with the goods, or whether he came ahead or not, I couldn't say. Some drayman had to bring the goods.

Q. Do you know what time of day that was?

A. No, I do not.

Q. Do you know what day of the month it was?

A. No, I don't, only my records——

Q. I see.

A. That is what I go to. I can't remember.

Q. You testified here a few moments ago when he told you it was a box of bedding, that he did not tell you anything else being in the box?

A. Yes.

Q. Why did you say that, when you don't remember the date or anything else about it?

A. Why, from my records, from the shipping order.

Q. Oh, you are just going now by what you wrote down?

A. Yes, sir.

Q. That it was a box of bedding?

A. Yes, sir.

Q. Do you recall his shipment in particular above other shipments that have been made there?

43 A. Why, I remember his coming there with the shipment, yes, sir.

Q. Who else came there, on that day?

A. I couldn't tell you. There was a good many of them.

Q. You handle an enormous lot of shipments out of there?

A. Quite a good many.

Q. And you can't remember the conversation that you have with each individual that comes there, can you?

A. A thing I must get at in making the bill of lading,—get at what the articles are, in order for the rate clerk——

Q. Now suppose Mr. Kirkendall went to you and said "I have got a box I want to ship to Cleveland and it contains aluminum ware and a chafing dish and a great many other articles," you cannot bill those different articles on the—you can't put them all in the bill of lading, can you? So isn't it up to you then to bill them at whatever you think the box contains?

A. Why yes.

Q. Now will you say definitely that Mr Kirkendall did not tell you that there were some house hold goods and miscellaneous articles in this box?

A. No. He did not.

Q. You are positive that he did not tell you?

A. I would have to go on my records. I would have to bill them as house hold goods, then.

44 Q. Well, there was some bedding in that?

A. Well——

Q. Didn't—as a matter of fact, if you can recall this individual transaction, didn't he tell you that he had a lot of household goods and kitchen utensils and aluminum ware and so forth and that it was wrapped with bedding, and didn't you say "well, I will bill that as bedding, then?"

A. No, I couldn't.

Q. You couldn't? What would you have billed them at?

A. I would have to bill them as household goods. They would have to be released.

The Court: Was there anything said about freight? The tariff or the rate?

Witness: I didn't have anything to do with the rate.

The Court: Well was there anything said to him about what rate would be charged regardless of what it was put in at?

Witness: I couldn't say, I don't remember.

The Court: You don't remember?

Witness: No.

Q. And you did not at that time make any——

A. If they were household goods they would have to be prepaid.

45 Q. If they were household goods?

A. If they were household goods they would have to be prepaid.

Q. Did you tell him that?

A. No, I didn't.

The Court: Well, what is bedding?
Witness: Bedding is a separate article.
The Court: Don't consider it household goods?
Witness: No.
Q. Do you recall how long Mr. Kirkendall was there, that day?
A. No, I do not.
Q. Do you recall of him reading over what you wrote down, after he had told you what was in these boxes?

Mr. Wheeler: I object to that. Immaterial.
The Court: Oh, this is cross examining him, about what he was told.

Q. If you testified that he had told you that the box billed as bedding really contained household articles, you would have to testify against the interests of the railroad, wouldn't you?

Mr. Wheeler: I object.
The Court: Oh yes, sustained.
Mr. Henderson: That is all.

(Witness excused.)

46 Thereupon Defendant, further to maintain the issues on its part to be maintained, called as a witness one Louis H. Geller, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Louis H. Geller.

By Mr. Wheeler:

Q. What is your full name?
A. Louis H. Geller.
Q. Where do you live?
A. Cleveland.
Q. What is your occupation?
A. Division Freight Agent, Erie Railroad Company.
Q. How long have you been Division Freight Agent for the Erie?
A. Twelve years.
Q. Now are you familiar with the tariffs of the Erie Railroad which were effective in September, 1920?
A. I am.
Q. And what is that tariff officially known as?
A. This is the consolidated freight classification No. 1, I. C. C. No. 45. That describes the classification the different commodities and different freight takes.

47 Q. That was the tariff on file with the Interstate Commerce Commission at Washington?
A. Yes, sir, it was—this is a duplicate of what was filed.
Q. I will ask you to turn to the tariff and tell the jury the provisions of the tariff in respect to the shipment of household goods?

Mr. Henderson: Well now I object, if the Court please.

The Court: Objection overruled.

Mr. Henderson: Well for this reason, that the tariff should be pleaded but it is not something—now if you are referring to these two parts here, all well and good, but this is not the Federal law or State law such that this court could take judicial notice, and any provision that they attempt to read in that wasn't pleaded in detail, I object to their now—to the introduction of them. You have pleaded two parts here.

The Court: Oh yes, they specifically plead that it was household goods and that the rate depended upon the value.

Mr. Henderson: Yes, but if the Court please, I understand they are attempting to read in here the—some classifications that they haven't pleaded and set out in detail as such that this court could——

The Court: I don't know what they are trying to read in,

48 yet.

Mr. Henderson: Well——

The Court: Of course it will be confined to what they are pleading here. Objection overruled.

Mr. Henderson: Exception.

Mr. Wheeler: Read the question.

(Question read.)

The Court: Well suppose you let him read it. It will speak for itself. This is the Interstate Commerce Act isn't it?

Mr. Wheeler: Oh yes.

The Court: Well the act will speak for itself; let him read it.

A. (Reading:) "Household goods, value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in accordance with the following, * * * If value of each article does not exceed ten (10) cents per pound,"—first class rate. "If value of each article exceeds ten (10) cents per pound and does not exceed twenty(20) cents per pound," classification rate is one and one quarter times first class. "If value of each article exceeds twenty (20) cents per pound," classification rating is one and one-half times first class.

Q. So that the——

49 Mr. Henderson: I object to that and ask that it go out because it has not been pleaded and it is not such a ruling that this Court can take judicial notice.

The Court: Well, objection overruled.

Mr. Henderson: Exception.

Q. The tariff then provides three rates for household goods?

A. It does. Dependent upon valuation.

Q. What further provision is there in the tariff covering the declaration of value?

A. The shipment will not be accepted unless the value is declared, either one or the other—either one of the three.

Q. Therefore, if a shipment of household goods is presented to the agent, he will not ship them unless the value is declared?

A. That is it, yes.

Q. He would have one of the three choices, under ten cents, over ten cents, and over twenty, is that it?

A. Yes, sir.

The Court: Supposing the agent does not know the difference?

Witness: It is whatever the shipper declares.

The Court: Supposing the shipper don't declare?

Witness: He wouldn't accept the shipment.

50 The Court: Suppose he did.

Mr. Wheeler: Suppose the agent declared the value?

The Court: No, suppose the shipper did not declare, and the agent accepted the property.

Mr. Wheeler: He would have to ship them according to the filed tariffs.

The Court: Suppose you had an agent that was ignorant of this law.

Mr. Wheeler: We do have some.

The Court: Well——

Mr. Henderson: He is presumed to know.

The Court: I think we might have what the law is, the Interstate Commerce Act, and then have what the parties said and done, not what somebody would do or would not do. Let's have the law of the Interstate Commerce Act, and then let's see what was done in this specific instance.

Q. What further provisions is there in the tariff in regard to the declaration of value?

A. There is a provision——

Q. As far as household goods are concerned?

Mr. Henderson: How is that?

A. (Reading:) "If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted."

51 Mr. Henderson: I object to that.

A. The classification further——

The Court: Oh no, he is only reading this act.

Mr. Henderson: I suppose you are going to introduce these acts are you, Mr. Wheeler?

Mr. Wheeler: I am going to introduce that tariff.

The Court: Yes. Oh no, he may read it.

Witness: The item in connection with the household goods concludes with the paragraph in brackets "Issued under authority of Interstate Commerce Commission's Released Rates Order No. 85 of November 13, 1919."

Q. On page 222, Consolidated Freight Classification No. 1, second column, under Household Goods, there is a "Note 1." Will you read that to the jury?

A. Note 1 reads "The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the

case may be, must be entered on Shipping Order and Bill of Lading as follows: 'I hereby declare the value of each article of Household Goods herein described as, dash, cents per hundred pounds,'" with underline and shipper's signature. "Or, 'The value of each article of Household Goods herein described is hereby agreed upon
52 as, dash, cents per hundred pounds,'"—or per pound, I should say.

The Court: That dash is a blank?

Witness: That is a blank.

The Court: For the amount to be put in there?

Witness: To be inserted.

The Court: Whatever the parties agree upon?

Witness: Whatever the shipper declares, and they must have either one of those two declarations, for a place for the shipper's signature.

Mr. Henderson: I object to that of course until they show——

The Court: Oh no, it speaks for itself.

Mr. Henderson: —where he signed anything like that.

Mr. Wheeler: Didn't sign anything?

The Court: They are not through with their defense. Objection overruled.

Mr. Henderson: Exception.

Q. "One box of bedding,"—is there a separate classification for that?

A. Yes, there is.

Q. That does not come under the Household Goods classification?

53 A. No, but under that description. It is separate in itself.

Q. And do you know what the rate on "one box of bedding" crom Corning——

A. That will be the first class rate, whatever that was at that time.

Q. Well, what was the first class rate?

A. I don't recall in cents per hundred pounds.

Q. And is there a separate classification for "one barrel of canned fruit"?

A. Yes, canned goods is first class there, that is first class less than carload lots.

Q. And "One box"——

Mr. Henderson: I think all this is immaterial. We are not talking about the proof of the other boxes that we got.

The Court: Yes, the only issue is on this one box that is missing.

Q. Had the "one box of bedding" been described as "household goods," and no declaration of value—and the declaration of value of ten cents or less per hundred pounds was declared, what would be—and the box weighed 280 pounds, what would be the limit of liability the railroad——

Mr. Henderson: I object.

The Court: Do you expect to show that by proof, that that was the fact in this case?

54 Mr. Wheeler: No, I am speaking——

The Court: Objection sustained, then.

Mr. Henderson: Can't show.

Mr. Wheeler: I have pleaded that that was the limit of our liability.

The Court: Yes, that is true.

Mr. Wheeler: On that I am asking him if the box had been described as household goods, in fact, which it was, what would have been the liability—limit of liability of the company. Now I have pleaded——

The Court: I suppose the Act itself would speak for itself if you would just introduce the Act.

Q. Well, as far as—what does the tariff provide as to a limit of liability on a released valuation of ten cents per hundred?

A. Ten cents per pound.

Q. Ten cents per pound?

A. First class rate.

Q. And what is the first class rate? Household goods?

A. I don't know just the exact figure. I believe it was about 73 cents per hundred pounds. I am just guessing at that.

Q. Well if—doesn't the tariff provide that with the released valuation of ten cents per houndred pounds, that the—that that is the limit of the liability of the railroad?

A. Yes.

Mr. Henderson: I—wait a minute, I object.

55 The Court: Yes, sustained. Let's have the Act. Let's not have him put the construction on the Act. Let's have the Act itself.

Q. Well let me see the tariff, will you please? Doesn't this show the rate from Corning to Cleveland?

A. It applies from Corning and all stations—to and from all stations on the Erie Railroad. In fact, every other station on other railroads, too. It doesn't show what the rate in cents per hundred pounds would be from Corning to Cleveland. That is a separate tariff.

Q. Do you know what rate "one chafing dish" takes from Corning to Cleveland?

A. That would be first class rate.

Q. What rating does "one fishing basket" take?

A. That would be—fishing? First Class rating. First class rating.

Q. "One box of millinery supplies"?

A. That would take double first class.

Q. Let me see that. "Skates". What rate does "skates" take?

A. They are second class.

Q. "Clothes basket?" What rate does that take?

A. Loose, four times first class.

Q. "Curtains"?
A. First class.

Mr. Wheeler: I think that is all

56 Cross-examination of Louis H. Geller.

By Mr. Henderson:

Q. You say you have been with the Erie Railroad some twelve years?
A. I have been at my present position twelve years.
Q. Yes.
A. Been with them longer than that.
Q. What is that, here?
A. That is a copy of the bill of lading.
Q. That is a copy of the bill of lading?
A. Yes.
Q. Now on the back of this you have several conditions?
A. Yes.
Q. In which you presume to bind the shipper to the conditions stated on the back of this, don't you?
A. Yes, sir.
Q. Now, I will ask you to read this one paragraph here that is checked?
A. (Reading:) "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

Q. That is, the company shall be liable for the value of the
57 goods at the time it was shipped, is that what this says?
A. The goods specified, yes.

Q. And this is a copy of the bill of lading that Mr. Kirkendall received, is it not?
A. Yes.
Q. What would be the liability of the railroad in case Mr. Kirkendall told the agent up there what was in this box and the agent still went ahead and billed it as a box of bedding?

Mr. Wheeler: I object.
The Court: Yes, sustained. Not going to let him put a construction on the law.

Q. I will ask you to read one other part here of this bill of lading, starting with the word——

The Court: Well the bill of lading speaks for itself doesn't it? Why ask.
Mr. Henderson: I will read this for the purpose of the record. "Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession,) the carrier or party in possession

shall not be liable for loss, damage," and so forth beyond their control. That is all.

Mr. Wheeler: That is all.

(Witness excused.)

58 The Court: Call your next.

Mr. Wheeler: That is our case.

The Court: Is that your case?

Thereupon the defendant rested.

The Court: Any rebuttal?

Rebuttal.

59 Mr. Henderson: Call Mr. Kirkendall.

The Court: Has this bill of lading been introduced?

Mr. Henderson: How is that?

The Court: Has this bill of lading been introduced?

Mr. Henderson: No, not yet. I want it to be introduced.

The Court: You want it to be introduced?

Mr. Henderson: Yes.

Mr. Wheeler: Here is the original. We will introduce the original if you wish.

(The same is offered and admitted in evidence as Defendant's Exhibit A, and is attached hereto and made a part of this bill of exceptions.)

60 And thereupon the plaintiff, MARTIN KIRKENDALL, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, reoffered himself as a witness in rebuttal, and having been previously duly sworn, testified as follows:

Direct examination of Martin Kirkendall.

By Mr. Henderson:

Q. Do you know Mr. Durkin?

A. Yes, sir.

Q. He is the freight agent at Corning, New York?

A. He—not the freight agent, he is the——

Q. Or the assistant, whatever it is?

A. Yes.

Q. Now when you went in to talk to him, did you tell him that that box contained bedding?

A. I told him that it contained miscellaneous household articles and bedding.

Q. As what? Did you make any stipulation as to any of the various articles contained in it?

A. Oh yes, yes, I——

Q. Well what did you tell him? Just——
61 A. Oh, some aluminum ware and different articles.

The Court: He has been all over that, in chief.
Witness: I didn't specify—I didn't specify——
The Court: This is rebuttal.
Mr. Henderson. Yes.
The Court: He has testified to that, that he told the agent that it contained household commodities, utensils, kitchen utensils and aluminum and bedding.

Mr. Henderson: That is all.
The Court: That's all, sir.
Mr. Wheeler: That is all.

(Witness excused).

62 The Court: Anything further? Now who has introduced this bill of lading, if anyone?
Mr. Henderson: I haven't introduced it, except I have read into the record two articles that contained—conditions contained on the back thereof. There is no reason why we should introduce it.
Mr. Wheeler: He said he was going to, but I want to introduce it, myself.
The Court: That is what I want to get at. You established a verbal contract here. Now just where does this bill of lading—what does the record show about it?
Mr. Wheeler: I am offering the original bill of lading in evidence.
The Court: You are offering it?
Mr. Wheeler: Yes; Defendant's Exhibit A.

Thereupon the plaintiff rested.
Thereupon the defendant rested.
Testimony closed.

63 (Thereupon, counsel for plaintiff moved the court for judgment for plaintiff; which motion was by the court overruled; to which ruling of the court, counsel for plaintiff then and there duly excepted).

(Thereupon, counsel for defendant moved the court to arrest the testimony from the jury and direct a verdict for the defendant; which motion was by the court overruled; to which ruling of the court counsel for the defendant then and there duly excepted).

64 The above and foregoing testimony, together with the exhibits hereinbefore referred to and hereto attached, was all of the evidence offered and given by each and all of the parties to this cause upon the trial of same in said municipal court, in and for the City of Cleveland, County of Cuyahoga, Ohio.
Thereupon, after argument by counsel for respective parties, the court charged the jury as follows:

65 In Municipal Court of Cleveland.

Charge of the Court.

The Court: Ladies and gentlemen, this is an action wherein one Martin Kirkendall sues the Erie Railway—Erie Railroad Company, claiming damages for the loss of a box of goods, and the plaintiff says that on or about the 18th day of September, 1920, he delivered to the said defendant company at Corning, New York, three packages to be shipped by freight to Cleveland, Ohio, and that said defendant company accepted the property for shipment.

That on or about the 24th day of September, 1920, defendant company notified him that the property had arrived here in Cleveland. That when he went to get said property, that he found that one box containing various numbers of articles was missing. That he never did receive that box, and that box contained property of his to the valuation of four hundred fifty dollars, and he prays damages at your hands in that amount.

The defendant company files its amended statement of defense to this plaintiff's claim, and admits that it is a corporation, admits that at the time plaintiff mentions in his statement of claim that it was a common carrier of freight between Corning, New York,
66 and Cleveland, and admits that on or about the 18th day of September, 1920, it did receive from plaintiff three packages to be shipped by freight to Cleveland, and admits that thereafter, on or about the 24th day of September, 1920, that two of the packages were delivered to the plaintiff, and that one of the packages was missing, and that it did fail to deliver that one package, but denies that the value of the property contained in that package was four hundred fifty dollars as alleged in the plaintiff's statement of claim. The defendant company likewise sets up a second defense, the right which it has—any party in court has a right to set up as many defenses as they have or as they might have, to any claim that any plaintiff or any person makes against him—for second defense the defendant company adopts all of the allegations which I have stated to you in this first defense, and says that when the plaintiff delivered this property to it at Corning, New York, for transportation to Cleveland, Ohio, that the three packages which—were described on the bill of lading as "one box of bedding, one barrel canned fruit, and one box"—and that the box which was missing at
67 Cleveland, Ohio, was the box described as "one box of bedding."

The defendant company says that the plaintiff either purposely or wilfully or through mistake mis-described the contents of that box, and that the defendant company was thereby misled and deceived as to its true contents, and the defendant company says that said box in fact contained household goods; that the rate on household goods depended upon the value declared in writing by the plaintiff, which released the liability of the defendant company to the amount so

declared in writing as provided by the freight classifications, as laid down in page 222 of the Interstate Commerce Act.

Defendant company further says that said classification provided that the tariff in reference to household goods was to this effect: the value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be noted on the shipping order and bill of lading as follows: "I hereby declare the value of each article of household goods here described at blank cents per pound." Signed by the shipper. "The
68 value of each article of household goods here described is hereby agreed upon as blank cents per pound." Signed by the shipper.

It further provides that if the consignor—that is the shipper—declines to declare the value or agree to be released to the agreed value in writing, the railway company will not accept of the shipment, and that by this act on account of the interstate commerce law, the plaintiff in misleading the defendant as to the true character of the goods, that the defendant company was prevented from obtaining the released valuation of the goods and the defendant company says that the rate paid for the transportation of this missing box would have limited the liability of the defendant company to twenty-eight dollars, had the contents of the box been properly described. That by reason of the rate paid and the missing goods being in fact household goods, the defendant's liability is limited to twenty-eight dollars, for which amount the defendant company confesses judgment.

To this statement of defense of the railroad company the plaintiff has filed his reply and denies that he intentionally or pur-
69 posely misdescribed the contents of the box marked "one box of bedding," and denies that he in fact misdescribed the contents of the box, denies that he misled or deceived the company as to its true contents, and again asks judgment as prayed for in his original statement of claim.

Those are the issues in this case, and we cannot get away from the issues that are presented by those pleadings.

In order for the plaintiff to recover in this case, this being a civil action, the law requires that he must prove his case to you by that degree of proof known as a preponderance of the evidence.

By preponderance of the evidence is meant the greater weight of the testimony, and in arriving at the greater weight of the testimony it would be your duty as jurors to take this evidence as you have heard it, both the instruments in writing and the oral testimony as testified to by the different witnesses, and arrive at what you believe to be the truthful fact in this case, the probability or improbability of the story that is told by the different witnesses, the interest involved, that he might have, their motive in testify-
70 ing. You have a right to believe all that they say, or disbelieve all that they say, or to believe a part of what a witness testifies to, and disbelieve other parts of a witness's evidence.

It is for you to use good common sense in arriving at what the true state of affairs are in this case from the evidence itself.

When you have arrived at what the true fact is, you apply such law as the court sees fit to give to you.

You are the sole judges of the facts. Notwithstanding any law that has been quoted to you by counsel, you take only such law as the court sees fit to give to you, once you have arrived at what the true facts are.

The issue is not very broad in this case, and I say to you as a matter of law that if you find as the plaintiff claims that he delivered to the defendant company—and of course the defendant company admits delivery of these goods, that is, of three boxes of goods or three packages—the defendant company does not admit that this box of missing goods contained all that the plaintiff says that it contained, or that if it did contain the things which the plaintiff says that it contained that the value is such as the plaintiff places
71 upon it, but the defendant company maintains that they did receive three packages of goods and that one package was missing, and was never delivered. That is admitted. Defendant company admits that.

Now if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package contained, and it was lost or failure to deliver it, then I say to you you should find for this plaintiff.

In the event that you find for the plaintiff you would then proceed to assess the plaintiff's damages. The damages would be the value of what property you found was packed in that box at the time—the value of that property at the time it was supposed to have been delivered here in Cleveland; that value.

You must confine yourselves to what evidence has been of-
72 fered on the part of the plaintiff as to the value of those particular goods,—solely and alone by that evidence.

I say to you, however, as a matter of law, that if you find as the defendant company claims, that this plaintiff knew that it was household goods and that he either did not impart that knowledge to the defendant company, or purposely withheld it, then I say to you as a matter of law that liability in this case would be limited to what the defendant company claims here, to-wit, ten cents per pound on household goods, which, in this instance, was two hundred eighty pounds, which would be limited liability of twenty-eight dollars.

Now as to the issue in this case, the first is to determine how and under what conditions were those goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge.

I say to you that the defendant company is not liable otherwise, except as to the limited liability of twenty-eight dollars as
73 set forth in their statement of defense.

I trust I have made myself clear on that. That is the only issue raised in this pleading. That is the only issue we are troubled with, at all.

The other issue in the case of course is to the amount and kind of property that was in that box, in the event that you should find that the plaintiff should recover to the value of the different articles.

In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be, together with interest from the date of the shipment to the first day of this term of court, which would be the 1st day of October of this year. Calculate interest that length of time, from the 24th day of September, 1920, until the 1st day of October of this year—in the event that you find the plaintiff should recover.

There are two forms of verdict. In the event you find the plaintiff should recover, you assess the damages, and each and every individual—that is, those of you who find that verdict will sign that particular verdict.

74 In the event that you find for the defendant company in this case—that is, that you find for the defendant company on its confession of judgment, that that is all that the plaintiff should recover—in other words, that the plaintiff should recover only the amount of the confessed liability of the defendant company, then you will assess that amount, which is twenty-eight dollars.

There can be but one verdict in this case, and that would be for the plaintiff, and it is either for what you find the value of the goods to be, or the twenty-eight dollar limited liability.

I think you understand that.

This is a civil action and the law requires that three fourths of your number must concur in the verdict before one can be reached, and this being a jury of six, means that five or all of you must agree upon a verdict.

When you do so agree upon a verdict you will all individually sign that particular verdict. Retire to your jury room, elect your foreman, and proceed to the deliberations.

Oh I might state to you, in no event can any recovery be
75 had for any more than is asked by the plaintiff in his statement of claim. I guess you have been charged in regard to that, before.

You may take the case.

Where is that bill of lading? There are some exhibits here, if you will get your exhibits together, gentlemen. I think here is an exhibit—or maybe this is only a copy. Get your evidence together, gentlemen—your written evidence. Where is it all?

(Jury retires with Plaintiff's Exhibits 1 and 2, and Defendant's Exhibit A.)

Mr. Wheeler: General exception to the charge.

Mr. Henderson: General exception to the charge.

76 Thereupon the jury retired, and upon due consideration returned a verdict in favor of the plaintiff, and against the defendant, to which verdict counsel for the defendant then and there duly excepted, all of which appears of record in this cause.

Thereafter, at the same term, within three days after the rendition of said verdict, being within the time allowed by law, the defendant filed its motion for a new trial in said cause, which is a part of the record herein, for the reasons and upon the grounds in said motion stated and set forth.

And thereafter, at the October, A. D. 1921 term of said Court, to wit, on the 10th day of December, A. D. 1921, said motion for a new trial was overruled by the Court; to which ruling of the Court said defendant then and there duly excepted.

Thereupon the Court entered judgment against said defendant, and in favor of said plaintiff, as appears by the record herein; to which the defendant then and there duly excepted.

And thereupon, on the 29 day of Dec. A. D. 1921, being within forty days after the overruling of defendant's said motion
77 for a new trial, and within the time allowed by law, said defendant filed with the Clerk of this Court this, its Bill of Exceptions, and prayed that the same might be allowed and signed by the Trial Judge, and filed as, and made a part of, the record in this cause, but not spread at large upon the journal.

Receipt of which Bill of Exceptions is hereby acknowledged, this 29 day of Dec. A. D. 1921. Peter J. Henry, Clerk. Chas. H. Tonsing, Deputy Clerk.

And thereupon notice of the filing of said Bill of Exceptions was duly served upon D. K. Henderson, Esq., and Gott, Chamberlain & Bloomfield, Esqs., attorneys for the plaintiff, the plaintiff, Martin Kirkendall, being the adverse party herein, by the Clerk of this Court, this 29 day of Dec. 1921.

And thereupon, on the 10 day of Jany A. D. 1922, being not less than ten days after such notice of the filing of this Bill
78 of Exceptions, and within five days after the expiration of such ten days, to wit, 11 days after the service of such notice, this Bill of Exceptions was duly transmitted to said Judge by the Clerk of said Court, together with all objections and amendments filed thereto.

Receipt of which Bill of Exceptions and all amendments and objections filed thereto is hereby acknowledged, this 11 day of Jan. A. D. 19—. Walter McMahon, Trial Judge.

Order Settling Bill of Exceptions.

And thereupon, upon the — day of ——, A. D. 1922, being within five days after the receipt of said Bill of Exceptions, together with all objections and amendments thereto, from said Clerk, and

within the time allowed by law, and upon due consideration of the same, the said Bill of Exceptions is hereby allowed and signed by the Court, and it is ordered that the same be transmitted to the Clerk of this Court, forthwith, and that the same be filed as, and made a part of, the record in this cause, but not spread at large upon
79 the journal. Walter McMahon, Trial Judge.

80 **Evidence: Plaintiff's Exhibit No. 1.**

Arrival Notice.

The Property described is ready for Delivery by the Erie Railroad Co.

Cleveland, O. Date, 9-24-20. Freight Bill No. 3161.

Consignee, and Address, Mrs. M. H. Gladding, 1953 Randall Rd.

Route (Point of Origin to Destination) ——.

Way-billed from Corning, N. Y. Way-bill date and number, Spt. 18-20. L 894. Full name of shipper, Martin Kirkendall. Car Initials and No., 49 CB" 95315.

Point and date of shipment, ——. Connecting line reference, ——. Previous way-bill reference, ——. Original car initials and No. ——.

Number of packages, articles, and marks.	Weight.	Rate.	Freight.	Advances.	Total.
1 Bx Bedding.....	2.80				
1 Bbl. Canned Fruit Glass.....	2.40				
1 Bx do. do. do.	....				
	5.20	79	4.11	....	4.11
Total Prepaid.					
War Tax.....					12
Total					4.23

Subject to the notices, rules and regulations printed on back hereof.

This Notice must be returned with the following Delivery Order filled out and signed by Consignee. First and only notice. This freight will be sent to Public Storage Warehouse at owner's risk and expense on Oct. 9, 1920, A. D.

Freight agent, E. R. R. Co.—Please deliver the above named goods to Cleveland Food Station, Oct. 6, 1920. Erie R. R. Co., Cleveland, O.

Who authorized to receipt for same in ——, name, —— ——.

Draw checks to the order of the Erie Railroad Co.

Property not removed within the free time limit designated in tariffs is subject to car demurrage and storage charges.

Non-perishable freight unclaimed or undelivered for 15 days after expiration of free time will be treated as refused and will be sold without further notice 60 days from date of notice of arrival. Perish-

able freight is subject to immediate sale when not removed promptly if such action becomes necessary to prevent waste.

Special Notice.

This company is not responsible for any loss, damage or delay, caused by fire or other casualty, occur-ing more than forty-eight hours (exclusive of legal holidays) after notice of arrival of property has been sent or given. Its liability as a common carrier ceases then, and this property may, at its option, be restored at the owner's risk.

Shipments are subject to demurrage or storage charges in accordance with published tariffs.

Freight remaining unclaimed or undelivered fifteen days after expiration of free time will be considered as refused, and will be sold without further notice sixty days from date of this notice.

81 *Contents of Box (Value).*

1 chafing dish	15.00
1 casserole	5.00
1 pr. blankets	8.00
1 dust mop	1.50
1 carpet sweeper	5.00
1 broom	1.00
Photographs	25.00
2 quilts	16.00
1 pr. hip boots	10.00
1 fishing basket	5.00
1 steel rod, reel & line	5.00
1 clothes basket	3.00
1 gas oven	5.00
1 bx. milly. supplies	15.00
6 prs. curtains	20.00
Clothing	25.00
1 silver smoking set	10.00
1 nut bowl	3.00
1 fern dish	5.00
1 pc. statuary	2.00
1 ice cream freezer	5.00
1 bed spread	5.00
1 pr. ice skates	2.00
1 hand emb. lunch cloth	15.00
1 leather sample case	10.00
1 Pyrex pie dish	2.00
	$223.50
1 Pyrex baking dish	3.00
1 Aluminum tea kettle with steamer	10.00
3 " kettles	7.00
1 " comb. roaster	10.00

1	Aluminum coffee pot	8.00
1	" frying pan	7.00
1	" kettle with steamer	10.00
2	Bibles @ 2.50	5.00
1	Book (leather cover)	5.00
1	" " "	1.00
3	Books	4.50
1	Ladies Hat	5.00
1	" blk. hat with flowers	10.00
1	" navy sailor hat	5.00
1	" white milan hat	8.00
1	" braid hat	7.00
1	" brown vel. hat	10.00
1	" taupe hat	5.00
1	" light brown hat	10.00
1	" hat brim	5.00
1	man's panama hat	6.00
	Total	$365.00

82 **Evidence: Defendant's Exhibit A.**

Uniform Bill of Lading—Standard Form of Straight Bill of Lading Adopted by Carriers in Official Classification Territory, effective J— 1, 1916.

Erie Railroad Company.

Shipper's No. —. Agent's No. —.

Straight Bill of Lading.

Original—Not Negotiable.

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Corning 9/18, 1920 from —— —— the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from —— to —— is in Cents per 100 Lbs.

If — times, 1st.	If 1st class.	If 2d class	If rule 25.	If 3d class.	If rule 26.	If rule 28.	If 4th class.	If 5th class.	If 6th class.	If special, per —.	If special, per —.
....	....	....	..	....	..	..	....	....	....	....	....

Consigned to, Mrs. M. H. Gladding.
Destination, Cleveland, State of O., County of ——.
Route ——. Car Initial, ——. Car No. ——.

—— ——.

No. packages.	Description of articles and special marks.	Weight (subject to correction).	Class or rate.	Check column.	
1	Box Bedding.....	280	....	....	If charges are to be prepaid, write or stamp here, "To be Prepaid."
1	1 Bbl. canned fruit glass	....	....	....	
1	Box " .	240	....	....	
.....		....	....	....	100,939.
.....		....	....	....	Received $— to apply in prepayment of the charges on the property described hereon.
.....		....	....	....	
.....		....	....	....	
.....		....	....	....

erty at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid.

Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port or export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed. Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed;

Provided, however, That where claims for loss, damage, or delay have been duly filed with the carrier and such claims have not been definitely declined in writing by the carrier before the beginning of the last six months of the two-year-and-one-day period, then suit thereon may be filed within six months from the date the claims are definitely declined in writing by the carrier, but not after. Where claims for loss, damage, or delay are not filed, or suits are not instituted thereon, in accordance with the foregoing provisions, the carrier will not be liable and such claims will not be paid.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically

rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described, shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this Bill of Lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

83 In the Municipal Court of Cleveland, April Term, 1921.

No. 158,240.

[Title omitted.]

Money Only.

Docket Entries: Judgment, etc.

[Filed Jan. 23, 1922.]

April Term.

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

April 7, 1921.—Statement of claim filed and summons issued.
April 7, 1921.—Demand for jury of 6 men filed.
April 13, 1921.—Summons returned endorsed. On the 8th day of April, 1921, I served this Writ on the within named The Erie Railroad Company by leaving a true and certified copy thereof with all endorsements thereon at the office and usual place of business with H. D. Dunklee, General Agent, in charge thereof, the President or other chief officers not found in my bailiwick. Bailiff's fees 50 cents.
April 23, 1921.—Statement of defense filed.
May 9, 1921.—Statement of reply filed.
November 22, 1921.—Amended statement of defense filed.
December 5, 1921.—To Court: Case called; parties in court; jury (6) sworn, who after due trial do find for the plaintiff on his statement of claim and assess his damages at $386.90.
December 8, 1921.—Motion by defendant for a new trial filed.
December 10, 1921.—To Court: Motion by defendant for a new trial in this cause is heard and overruled, to which ruling the defendant excepts. Wherefore it is considered that plaintiff recover of defendant said sum of $386.90 and also his costs of suit. Judgment is rendered against defendant for its costs herein.
December 29, 1921.—Bill of Exceptions by defendant filed and notice issued.
Jan. 3, 1922.—Notice of filing bill of exceptions returned endorsed: on the 30th day of December 1921 I served this writ on the within named Gott, Chamberlain & Bloomfield, by delivering a true and certified copy thereof, with all endorsements thereon, to F. B. Gott, one of the partners. Fee 50¢.
Jan. 10, 1922.—Bill of exceptions transmitted to trial judge.
Jan. 13, 1922.—Bill of exceptions received from trial judge.

84 THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

I, Peter J. Henry, Clerk of The Municipal Court of Cleveland, do hereby certify that the above is a true transcript of the Docket Entries of said Court, in the above entitled cause, and that the said —— —— entered into bond, with approved sureties, conditioned to abide and perform the order and judgment of the Appellate Court, and to pay all moneys, costs and damages which may be required of or awarded against — by said Appellate Court.

And I also certify that the enclosed are the original papers and pleadings, filed in said cause, in the said Municipal Court of Cleveland.

Attest, my hand and the Seal of said Court, at Cleveland this 18th day of January, 1922. Peter J. Henry, Clerk, By Orville K. Heck, Deputy Clerk. [Seal of the Municipal Court of Cleveland, Ohio.] Attest: John P. Dempsey, Chief Justice. [Seal of the Municipal Court of Cleveland, Ohio.]

[File endorsement omitted.]

85 STATE OF OHIO,
Cuyahoga County, ss:

In the Municipal Court of Cleveland.

No. 158,240.

[Title omitted.]

Statement of Claim.

[Filed Apr. 7, 1921.]

Now comes the plaintiff, Martin Kirkendall, by Gott, Chamberlin & Bloomfield, his attorneys, and says that the defendant herein is a corporation, organized and existing as such.

Plaintiff complains of defendant and says that on or about the 18th day of September, 1920, plaintiff delivered to said defendant company at Corning, New York, three packages to be shipped by freight to Cleveland, Ohio, of which he was the owner; that plaintiff accepted said property for shipment to Cleveland.

That thereafter, to wit: on or about the 24th day of September, 1920 the defendant company notified this plaintiff thru his agent that said goods had arrived and requesting that he call for them.

Plaintiff further says that when he went to get said articles, he found that one box containing numerous articles was missing; that he has never received said box from the defendant company and that the value of the articles contained in said box was Four Hundred Fifty Dollars ($450.00).

Wherefore, plaintiff prays judgment against defendant for the sum of Four Hundred Fifty Dollars ($450.00) with interest from the 24th day of September, 1920. Gott, Chamberlin & Bloomfield, Attorneys for Plaintiff.

86 & 87 STATE OF OHIO,
Cuyahoga County, ss:

Martin Kirkendall, being first duly sworn, says that he is the plaintiff in the above entitled action; that the facts stated and allegations contained in the foregoing Statement of Claim are true, as he verily believes. Martin Kirkendall.

Sworn to and subscribed before me this 6th day of April, 1921. D. K. Henderson, Notary Public.

Tax Fee, 40¢.

88 [File endorsement omitted.]

89 **Summons and Service.**

[Filed Apr. 13, 1921.]

Summons in Action for Money Only in Cases Over $100.00.

No. 158,240.

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

To the bailiff of the Municipal Court of Cleveland:

You are commanded to notify The Erie Railroad Company that it has been sued by Martin Kirkendall in the Municipal Court of Cleveland that unless it file a statement of defense by the 23 day of April, A. D. 1921, the statement of claim of the said plaintiff against it filed in the Clerk's office of said Court, will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 9 day of April, A. D. 1921.

Witness, Peter J. Henry, Clerk of said Court, and the seal thereof, at the City of Cleveland, this 7 day of April, A. D. 1921. Peter J. Henry, Clerk, By J. E. Walsh, Deputy Clerk. [Seal of the Municipal Court Cleveland Ohio.]

Returnable on 2nd day after issue.

90 [File endorsement omitted.]

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

On the 8th day of April, 1921, I served this writ on the within named The Erie Railroad Company by leaving a true and certified copy thereof with all endorsements thereon at the office and usual place of business with H. O. Dunkle, General Agent in charge thereof the president or other chief officers could not be found in my bailiwick. J. Martin Thumm, Bailiff, by Ira J. A. Morgan, Deputy Bailiff.

Bailiff's fees:

Service and Return.. 50
Copy ....
Mileage ....

[File endorsement omitted.]

91 In the Municipal Court of Cleveland.

Received payment Apr. 7, 1921. Peter J. Henry, Clerk, By ——, Deputy.

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

No. 158,240.

MARTIN KIRKENDALL, Plaintiff,

vs.

ERIE RAILROAD CO., Defendant.

Demand for Jury Trial.

[Filed Apr. 7, 1921.]

Now comes the Plaintiff and demands a jury of 6 in the above entitled cause. Gott, Chamberlin & Blomfield, Attorney- for Pltff.

[File endorsement omitted.]

92 STATE OF OHIO,
Cuyahoga County, ss:

In the Municipal Court of Cleveland.

No. 158,240.

[Title omitted.]

Statement of Defense.

[Filed Apr. 23, 1921.]

First Defense.

Defendant, Erie Railroad Company, for its statement of defense to plaintiff's statement of claim, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that at the time mentioned in plaintiff's statement of claim, was a common carrier of freight by railroad between Corning, N. Y., and Cleveland, Ohio, and other points.

Further answering defendant admits that on or about the 18th day of September, 1920, it received from plaintiff, three packages to be shipped by freight to Cleveland; that thereafter on or about the 24th day of September, 1920, two of the packages were delivered to plaintiff and that one of the packages was missing.

Further answering defendant denies that the value of said missing package was $450.00 as alleged in plaintiff's statement of claim.

Second Defense.

Defendant here adopts all allegations in its first defense as though repeated at length and further says that on or about the 18th day of September, 1920, plaintiff delivered to defendant at Corning, N. Y., for transportation to Cleveland, Ohio, three packages which he described in the bill of lading as "one box of bedding, one barrel of canned fruit and one box" and that the box which was
93 & 94 missing at Cleveland, Ohio, was the box described as "one box bedding."

Further answering defendant says that plaintiff purposely and wilfully misdescribed the contents of said box and defendant was thereby mislead and deceived as to its true contents. Defendant says that said box in fact contained household goods and that the rate on household goods depended upon the value described in writing by plaintiff which released the liability of the defendant to the amount so declared in writing as provided for in tariffs of the defendant which were open for inspection and published and on file with the Interstate Commerce Commission at Washington.

Defendant further says that said classification provides that household goods will not be received for shipment unless the value thereof

is declared in writing. By the act of plaintiff in misleading defendant as to the true character of the goods, defendant was prevented from obtained released valuation of the goods. Defendant says that the rate paid for the transportation of this missing box would have limited the liability of the defendant to $28.00 had the contents of the box been properly described; that by reason of the rate paid and the missing goods being, in fact, household goods, defendant's liability is limited to $28.00 for which amount defendant confesses judgment. Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Defendant.

STATE OF OHIO,
Cuyahoga County, ss:

R. C. Wheeler being duly sworn says that he is one of the attorneys for the Erie Railroad Company, a corporation, Defendant; that the allegations of the foregoing statement of defense are true as he verily believes. R. C. Wheeler.

Sworn to before me and subscribed in my presence by said affiant this 23rd day of April, 1921. W. W. Wilson, Notary Public. [Notarial Seal, Cuyahoga County, Ohio.]
Tax due, 40¢.

95 [File endorsement omitted.]

96 STATE OF OHIO,
Cuyahoga County, ss:

In the Municipal Court of Cleveland.

No. 158,240.

[Title omitted.]

Amended Statement of Defense.

[Filed Nov. 22, 1921.]

First Defense.

Defendant, Erie Railroad Company, for its amended statement of defense to plaintiff's statement of claim, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that at the time mentioned in plaintiff's statement of claim, was a common carrier of freight by railroad between Corning, N. Y., and Cleveland, Ohio, and other points.

Further answering defendant admits that on or about the 18th day of September, 1920, it received from plaintiff, three packages to be shipped by freight to Cleveland; that thereafter on or about the 24th

day of September, 1920, two of the packages were delivered to plaintiff and that one of the packages was missing.

Further answering defendant denies that the value of said missing package was $450.00 as alleged in plaintiff's statement of claim.

Second Defense.

Defendant here adopts all allegations in its first defense as though repeated at length and further says that on or about the 18th day of September, 1920, plaintiff delivered to defendant at Corning, N. Y., for transportation to Cleveland, Ohio, three packages which he described in the bill of lading as "one box of bedding, one barrel of canned fruit and one box" and that the box which was missing at Cleveland, Ohio, was the box described as "one box bedding".

97 Further answering, defendant says that plaintiff, either purposely or wilfully or through mistake, misdescribed the contents of said box and defendant was thereby misled and deceived as to its true contents. Defendant says that said box in fact contained household goods, and that the rate on household goods depended upon the value declared in writing by plaintiff, which released the liability of the defendant to the amount so declared in writing as provided for in Consolidated Freight Classification No. 1, page 222, which said tariffs were on file at Corning, N. Y. and other stations of this defendant and were open for public inspection, and which tariffs were on file with the Interstate Commerce Commission at Washington.

Defendant further says that said classification provides in said tariff in reference to household goods as follows:

"Note 1. The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on shipping order and bill of lading as follows:

'I hereby declare the value of each article of household goods herein described as —¢ per pound.' —— ——, (Shipper's signature).'

or

'The value of each article of household goods herein described is hereby agreed upon as —¢ per pound.' —— ——, (Shipper's signature).

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted.

(Issued under authority of Interstate Commerce Commission's Released Rate Orders No. 35 of November 18th, 1918.)"

By the act of plaintiff in misleading defendant as to the true character of the goods, defendant was prevented from obtaining the released valuation of the goods. Defendant says that the rate paid for the transportation of this missing box would have limited the liability of the defendant to Twenty-eight ($28.00) Dollars had the contents of the box been properly described; that by reason of the rate

paid and the missing goods being in fact household goods, defendant's liability is limited to Twenty-eight ($28.00) Dollars,
98 & 99 for which amount defendant confesses judgment. Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Defendant.

STATE OF OHIO,
Cuyahoga County, ss:

R. C. Wheeler, being duly sworn, says that he is one of the attorneys for the Erie Railroad Company, a corporation, Defendant; that the allegations of the foregoing amended statement of defense are true as he verily believes. R. C. Wheeler.

Sworn to before me and subscribed in my presence by said affiant this 22 day of November, 1921. B. D. Holt, Notary Public. [Notarial Seal, Cuyahoga County, Ohio.]
Tax Fee, 40¢.

100 [File endorsement omitted.]

101 & 102 STATE OF OHIO,
Cuyahoga County, ss:

In the Municipal Court of Cleveland

No. 158,240.

[Title omitted.]

Reply.

[Filed May 9, 1921.]

Now comes the *defendant* and for reply to defendant's second defense denies that said plaintiff intentionally or purposely misdescribed the contents of said box, marked "one box bedding"; denies that he in any way misdescribed the contents of said box; denies that defendant was misled or deceived as to its true contents.

Plaintiff further denies each and every other allegation of said defendant's second defense. Gott, Chamberlin & Bloomfiled, Attorneys for Plaintiff.

STATE OF OHIO,
Cuyahoga County, ss:

Martin Kirkendall, being first duly sworn, says that he is the plaintiff in the above entitled action; that the facts stated and allegations contained in the foregoing Reply are true, as he verily believes. Martin Kirkendall.

Sworn to and subscribed before me this 4th day of May, 1921. D. K. Henderson, Notary Public.
Tax Fee, 40¢.

103 [File endorsement omitted.]

104 THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

October Term, A. D. 1921, to wit, December 5th, 1921.

No. 158,240.

[Title omitted.]

Verdict.

We, the jury in this case, being duly impaneled and Sworn, do find for the Plaintiff on his Statement of Claim and assess his Damages at $386.90. Thomas Morgan, Foreman. 2, Alma Eyler. 3, Peter Faber. 4, Lowell Guscott. 5, Bertha Hamilton. 6, Edna Lemmon.

105 & 106 STATE OF OHIO,
Cuyahoga County, ss:

In the Municipal Court of Cleveland.

No. 158,240.

[Title omitted.]

Motion for New Trial.

[Filed Dec. 8, 1921.]

Now comes defendant and prays the court to set aside the verdict heretofore rendered herein and grant it a new trial on the following grounds to wit:

(1) The Court erred in overruling the motion of defendant made at the conclusion of all the evidence to instruct the jury to return a verdict in favor of the defendant upon the ground that from all the evidence plaintiff was not entitled to recover as a matter of law.
(2) The Court erred in the admission of testimony offered on behalf of plaintiff during the trial which was objected to by defendant and to which it at the time excepted.
(3) The Court erred in its charge to the jury to which defendant excepted as specifically shown by the record.
(4) The verdict is contrary to law.

(5) The verdict is not supported by sufficient evidence and is not sustained by the weight of the evidence.

(6) For other errors and irregularities apparent from the record. Cook, McGowan, Foote, Bushnell & Lamb Attorneys for defendant.

107 [File endorsement omitted.]

108 STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals.

No. —.

[Title omitted.]

Petition in Error.

Now comes Erie Railroad Company, a corporation, plaintiff in error, and files this, its petition in error, and complaining of the defendant in error, Martin Kirkendall, says that at the October term 1921 of the Municipal Court of Cleveland, Ohio, in an action therein pending wherein the defendant in error was plaintiff and the plaintiff in error was defendant, being No. 158240 on the docket of said court, said defendant in error recovered a judgment against this plaintiff in error as appears by the record therein. A transcript of the docket and journal entries thereof together with the original papers, including the bill of exceptions, taken and allowed in said cause, is filed herewith and made a part hereof. The plaintiff in error says that there is error in said proceedings and record prejudicial to the plaintiff in error in the following particulars, to-wit:

(1) That the verdict and judgment of said court is contrary to law.

(2) That said verdict and judgment is not sustained by sufficient evidence and is against the weight of the evidence.

(3) That said court erred in admitting testimony offered by plaintiff over the objection of defendant, to which defendant at the time excepted.

(4) That said court erred in excluding testimony offered by defendant and excepted to at the time.

(5) That said court erred in overruling the motion of the defendant to direct a verdict for defendant at the conclusion of all the testimony.

(6) That said court erred in overruling the motion of defendant for a new trial.

(7) That said court erred in its charge to the jury.

(8) That said verdict and judgment is excessive.

(9) That said verdict and judgment is in violation of the Act of Congress of the United States entitled "An Act to Regulate Commerce" passed February 4, 1887, and the various amendments thereto, commonly known as the Interstate Commerce Act.

(10) That said verdict and judgment is in violation of the constitution of the United States and particularly Article 1, Sec. 10, thereof, by impairing the contract rights of defendant and for the same reason is a violation of the constitution of the State of
109 Ohio, particularly Article II, Sec. 28 thereof.

(11) For other errors and irregularities appearing upon the record.

Wherefore, plaintiff in error prays that said judgment of the Municipal Court of Cleveland against it may be reversed and that the said plaintiff in error may be restored to all things it has lost by reason thereof. Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Plaintiff in Error.

Martin Kirkendall, defendant in error, by his attorneys, Gott, Chamberlain, & Bloomfield, hereby waives the issuance and service of summons herein upon him, and voluntarily enters his appearance herein Gott, Chamberlain & Bloomfield, Attorneys for Defendant in Error.

110 State of Ohio,
Cuyahoga County, ss:

In the Court of Appeals, January Term, 1922.

C. P. 158,240. C. A. 4077.

[Title omitted.]

Error to Municipal Court.

Judgment.

January 23rd, 1922.—Petition in error, waiver of process, transcript and original papers and bill of exceptions from Municipal Court filed.

February 7th, 1922—Brief of plaintiff in error with two copies filed.

September 19th, 1922.—Brief of defendant in error and two copies filed.

November 27th, 1922.—Reply brief by plaintiff in error and two copies filed.

December 1st, 1922.—To Court: This cause came on to be heard upon the pleading, and the transcript of the record in the Municipal Court of the City of Cleveland, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Municipal Court is affirmed, there being however, in the opinion of the court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error his costs herein. Ordered that

a special mandate be sent to said Municipal Court, to carry this judgment into execution. The plaintiff in error excepts.

Journal Entry.

Jr. 4, Pg. 715.

March 20th, 1923.—This day there was filed in this court, a certified copy of Journal Entry from the Supreme Court of Ohio, which is as follows, to-wit:

"STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1923, to-wit, Tuesday, March 20th.

No. 97.

THE ERIE RAILROAD COMPANY

vs.

MARTIN KIRKENDALL.

Motion for an Order Directing the Court of Appeals of Cuyahoga County to Certify Its Record.

It is ordered by the court that this motion be, and the same hereby is overruled.

Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do- hereby certify that the foregoing entry is truly taken and correctly copied from the records of said court, to-wit: from Journal No. 29, Page 395. In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 27th
111 day of March A. D. 1923. Seba H. Miller, Clerk, By L. J. Corcoran, Deputy. (Seal.) Attest: George Wallace, Clerk, By R. E. Mollenkopf, Deputy." Jr. 4, Pg. 808.

112 STATE OF OHIO,
Eighth District:

In the Court of Appeals of Cuyahoga County.

No. 4077.

[Title omitted.]

Error to the Municipal Court of Cleveland.

Opinion.

[December 4, 1922.]

VICKERY, *P. J.:*

This case comes into this Court on a petition in error to the Common Pleas Court of Cuyahoga County. In the court below, Kirkendell brought a suit to recover damages in the sum of Four Hundred and Fifty Dollars against the Erie Railroad Company, because of the loss of a certain box of goods that was shipped from Corning, New York to Cleveland. In said shipment there were three packages, two boxes and one barrel. The box in question was classified as "Box, Bedding, One Barrel, One Box," and contained, according to the evidence, certain household utensils, personal wearing apparel and bedding. In the trial below, the jury returned a verdict for $386.90. A motion for a new trial was made which the Court overruled, and the case is prosecuted to this Court to reverse
113 said judgment claiming that it is against the law.

There is nothing in the record of this case to show that any collusion or fraud was entered into between the agent of the railroad company and the shipper. There is some dispute in the record as to whether the shipper told the agent just what the box contained, but the court submitted that question fairly to the jury under a charge that, if they had not communicated to him what it contained, he would not be entitled to recover. There is nothing in the record to show but what the Railroad Company classified this box of goods itself, and it is admitted that, according to the classification they paid the regular freight on such classification. That it contained other things besides bedding is clearly proven in this case, but we think from the whole record and from the verdict of the jury under a proper charge by the court, whatever was in that box was there with the full knowledge of the Railroad Company through its agent, and there is no fraud, collusion or negligence charged in any way, and the proof shows that the goods were valued at least the amount of the verdict of the jury, and we do not see under the circumstances why the plaintiff would not be entitled to recover under the bill of lading that is given in this case.

It must be remembered that the shipper was nowhere called upon to place a value upon these goods and, under the circumstances of

this case it seems to us he was entitled to recover the full
114 & 115 value.

We do not deem it expedient to discuss the various questions that were raised by the brief of plaintiff in error because we do not think that they apply with much force to this case.

Taking the whole record together, we do not find any error which would warrant us to reverse the case and the judgment is, therefore, affirmed.

Ingersoll and Sullivan, JJ., concur.

Counsel for Plaintiff in Error: Messrs. Cook, McGowan, Foote, Bushnell and Lamb.

Counsel for Defendant in Error: Messrs. Gott, Chamberlin, Bloomfield and Henderson.

[File endorsement omitted.]

116 **Clerk's Certificate.**

THE STATE OF OHIO,
Cuyahoga County, ss:

I, George Wallace, Clerk of the Court of Appeals, in and for said County, do hereby certify that the above is a true transcript of the Docket and Journal Entries of said Court and the Opinion of the Court of Appeals in the above entitled cause.

And I also certify that the enclosed are true copies of the original papers and pleadings, filed in said cause, in the said Court of Appeals.

Attest, my hand and the seal of said court, at Cleveland, this 2nd day of April, 1923. George Wallace, Clerk, by R. E. Mollenkopf, Deputy Clerk. [Seal Court of Appeals, Cuyahoga County, Ohio.]

117 In the Supreme Court of Ohio.

[Title omitted.]

Motion for an Order to the Court of Appeals of Cuyahoga County to Certify Its Record.

[Filed January 29th, 1923.]

Comes now plaintiff in error, Erie Railroad Company, and moves the Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify to this Court its record in the cause of Erie Railroad Company, Plaintiff in Error, vs. Martin Kirkendall, Defendant in Error.

Plaintiff in error represents to this Honorable Court that;

(1) Said cause is one of public and great general — in that

(*a*) It involves the interpretation of the laws of the United States, commonly known as the Interstate Commerce Act, and amendments thereto.

(*b*) It involves the interpretation of railroad freight classifications and tariffs on file with the Interstate Commerce Commission, and with the Public Utilities Commission of Ohio.

(2) That error has intervened in said cause in said Court of Appeals in that said Court affirmed the Judgment of the Municipal Court of Cleveland, whereas said judgment should have been reversed.

Hearing of this motion is asked for on Thursday the 8th day of February 1923, or as soon thereafter as the Court can hear the same. Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Plaintiff in Error.

118 In the Supreme Court of Ohio.

[Title omitted.]

Notice of Motion for an Order to Certify Record.

To the said defendant in error:

You are hereby notified that said plaintiff in error has filed in the Supreme Court of the State of Ohio its motion for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify to the Supreme Court its record in the cause entitled "Erie Railroad Company, Plaintiff in Error, vs. Martin Kirkendall, Defendant in Error."

Said motion will be heard in the Supreme Court on 8th day of February 1923, at 10 o'clock A. M. or as soon thereafter as the Court can hear the same.

A copy of said motion and of Plaintiff in error's brief accompanies this notice. Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Plaintiff in Error.

Service of this notice is acknowledged by said defendant in error this 26th day of January 1923. Cott, Chamberlan, Bloomfield & Henderson, Attorneys for Defendant in Error.

119 **Minute Entries.**

Supreme Court of the State of Ohio, January Term, A. D. 1923.

(Minute Book No. 37, Page 234.)

Number 17834.

Title of Case.

ERIE RAILROAD COMPANY, Plaintiff in Error,

v.

MARTIN KIRKENDALL, Defendant in Error.

Action: Motion for an Order Directing the Court of Appeals of Cuyahoga County to Certify Its Record.

Attorneys: Cook, McGowan, Foote, Bushnell & Lamb, for plaintiff in error, Cleveland, Ohio; Cott, Chamberlain, Bloomfield & Henderson, for defendant in error, Cleveland, Ohio.

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees.

1923.

Jan. 29. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record filed.
" 29. Notice of motion for an order to certify record filed.
" 29. Brief of plaintiff in error in support of motion to certify record filed.
" 29. Proof of service of brief filed.
Feby. 23. Defendants printed briefs filed.
" 26. Proof of service filed.
March 3. Application of defendant for allowance of attorney fees and damages filed.
" 20. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record, overruled. Journal No. 29, page 395.
" 27. Certified copy of entry sent clerk.

120 No. 17834.

ERIE RAILROAD COMPANY

v.

MARTIN KIRKENDALL.

Journal Entry.

1923.

March 20. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record:

"It is ordered by the Court that this motion be, and the same hereby is, overruled." Journal No. 29, Page 293.

121 STATE OF OHIO,
City of Columbus, ss:

Supreme Court of the State of Ohio.

Clerk's Certificate.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing motion for an Order directing the Court of Appeals of Cuyahoga County to certify its record, notice and acknowledgment — are true copies of the original motion, notice and acknowledgment filed in said cause; and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 5th day of April, A. D. 1923. Seba H. Miller, Clerk Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

WRIT OF CERTIORARI AND RETURN—Filed July 7, 1923

STATE OF OHIO,
Cuyahoga County, ss:

IN THE COURT OF APPEALS

No. 4077

[Title omitted]

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the certified transcript of record prepared by the Clerk of the Municipal Court of Cleveland, Ohio, filed with the Petition in Error herein and now on file in the office of the Clerk of the Supreme Court of the United States, shall stand as the return of said Clerk of the said Court of Appeals for the 8th Judicial District of the State of Ohio to the writ of certiorari, without the preparation of another transcript, and to this end it shall only be necessary for said Clerk to transmit to the said Clerk of the United States Supreme Court a certified copy of this stipulation as the return to the writ of certiorari.

Cook, McGowan, Foote, Bushnell & Lamb, Attorneys for Plaintiff in Error. Gott, Chamberlin, Bloomfield & Handerson, Attorneys for Defendant in Error.

STATE OF OHIO,
Cuyahoga County, ss:

I, George Wallace, Clerk of the Court of Appeals of the Eighth Judicial District of Ohio, in and for said County, do hereby certify that the above and foregoing is a full, true and complete copy of the Stipulation of the parties as the return to be made to the writ of certiorari in the case of Erie Railroad Company, plaintiff in error, against Martin Kirkendall, defendant in error, No. 4077, as fully and completely as said stipulation remains on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the Court of Appeals for the Eighth Judicial District of Ohio, in and for Cuyahoga County, at my office in Cleveland, Ohio, this 5th day of July, 1923.

George Wallace, Clerk, By R. E. Mollenkopf, Deputy Clerk.
(Seal of Court of Appeals, Cuyahoga County, Ohio.)

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals for the Eighth Judicial District of the State of Ohio, Greeting:

Being informed that there is now pending before you a suit in which Erie Railroad Company is plaintiff in error, and Martin Kirkendall is defendant in error, which suit was removed into the said Court of Appeals by virtue of a writ of error to the Municipal Court of the City of Cleveland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsements omitted.]

In the Supreme Court of the United States

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MARTIN KIRKENDALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Erie Railroad Company, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals of the 8th Judicial District of the State of Ohio.

Your petitioner says that this action was brought in the Municipal Court of Cleveland, Ohio, to recover the claimed value of a shipment of household furniture which was lost in transit.

Trial resulted in a verdict against the Railroad Company, and after overruling its duly filed Motion for a new trial, the trial court entered judgment on the verdict against the Erie Railroad Company.

Thereafter, your petitioner prosecuted error to the judgment of the trial court in the Court of Appeals for the 8th Judicial District of the State of Ohio, sitting within and for Cuyahoga County in said State, which Court, on the 1st day of December, 1922, affirmed the judgment of the trial court.

Thereafter, on the 29th day of January, 1923, your petitioner filed in the Supreme Court of the State of Ohio a Motion for an order directing said Court of Appeals to certify its record to said Supreme Court for review, and said court, on the 20th day of March, 1923, entered an order overruling the said Motion, and thereupon the judgment of said Court of Appeals became the final judgment of the highest state court in which a judgment in said cause could be had.

Your petitioner says that in said cause a title, right or immunity was claimed by the petitioner under statutes of the United States, as will hereinafter appear, and the decision of said court was against said right, title or immunity.

The facts of the case are as follows:

STATEMENT OF THE CASE.

On September 18, 1920, at Corning, New York, respondent delivered to petitioner a shipment described in the bill of lading as "one box of bedding, one barrel and one box," for transportation to Cleveland, Ohio. The article described as "one box of bedding" was never delivered. It is admitted that the box in question contained household furniture rather than bedding.

As will hereafter more fully appear, the tariff and classifications under which the shipment moved, provided for a limitation of liability for the loss of a shipment of household furniture, whereas, no limitation of liability was provided as to shipments of bedding. Respondent claims as damages the full value of the household furniture. Petitioner claims the right to limit its liability.

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household furniture, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10¢ or less per lb., the rates progressively increasing with increased valuation.

Said order of said Commission stipulated among other things:

> "The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shipper's signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as ..... cents per pound.'

.....

Shipper's signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted."

At the time of the shipment the respondent did not state the value of the property nor did the petitioner inquire as to the value. The respondent claims that he told the agent receiving the shipment for the petitioner that the box contained household furniture, but that nevertheless the agent described the shipment in the bill of lading as bedding. The charges paid were the basic rate established upon a declared value of not exceeding 10¢ per pound. This rate was what was known as the "first class" rate and was the same rate as that applying to a shipment of bedding. The respondent alleged damages in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the furniture, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

QUESTION OF LAW TO BE REVIEWED.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply * * *. Second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Court charged the jury as follows, to which your petitioner duly excepted:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package contained, and it was lost or failure to deliver it, *(sic)* then I say to you you should find for this plaintiff."

"Now as to the issue in this case, the first is to determine how and under what conditions were those goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge."

"In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *"

This view of the law was also taken by the Court of Appeals. It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding, by the agent of the petitioner, when he knew that it was household furniture, preclude the petitioner from limiting its liability.

Your petitioner contends that since this shipment was in fact household furniture, its transportation by petitioner is controlled by the orders, tariffs and classifications applicable to household furniture, and the fact that the agent described the shipment as bedding, even though he did so with full knowledge, is immaterial. Your petitioner further contends that the tariff applicable to shipments of household furniture limited petitioner's liability in this case to 10c per pound, which is the limitation of liability attaching to the rate under which the shipment moved, which rate the respondent paid, and that your petitioner's right to so limit its liability is derived from said Cummins Amendment, and is a right, title, privilege or immunity under said Statute.

Your petitioner therefore represents that said Court of Appeals has rendered a decision against said right,

title, privilege or immunity claimed by your petitioner under such statute; that such decision is erroneous; that the same ought to be corrected.

And your petitioner files herewith, as an exhibit hereto, as required by the rules of this Court, a duly certified transcript of the record and proceedings of the Municipal Court of Cleveland, Ohio; of the Court of Appeals of the 8th Judicial District of the State of Ohio and of the Supreme Court of Ohio in the said case hereinbefore mentioned.

WHEREFORE, your petitioner prays that a writ of certiorari may issue to said Court of Appeals requiring said court to certify said cause to this Court for review and determination by it, and that upon the hearing said judgment and decision of said Court of Appeals may be reversed and petitioner may be restored to all things it has lost by reason thereof.

And your petitioner will ever pray.

Respectfully submitted,

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

Erie Railroad Company,
Petitioner,

vs.

Martin Kirkendall,
Respondent.

NOTICE.

Respondent is hereby notified that on Monday, the 21st day of May, 1923, at the opening of the above named Court on that day, or thereafter at the convenience of said Court, the Erie Railroad Company will submit to the Supreme Court of the United States through the Clerk of said court, a petition for Writ of Certiorari and Brief in support thereof, copies of which are herewith delivered to you in compliance with the rules of said court.

Dated at Cleveland, Ohio, April 17, 1923.

Edward A. Foote,
Benjamin D. Holt,
Attorneys for Petitioner.

Due service and receipt of a copy of the foregoing Notice and of the Petition for Writ of Certiorari and Brief in support of said Petition are hereby acknowledged, this 17th day of April, 1923.

Gott, Chamberlain, Bloomfield & Henderson,
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF OF PLAINTIFF IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

This was a civil action instituted in the Municipal Court of Cleveland, Ohio, by Martin Kirkendall against the Erie Railroad Company, to recover the claimed value of a shipment of household furniture which was lost in transit.

The case was tried in said Municipal Court and judgment was rendered in favor of the plaintiff therein, which judgment was affirmed by the Court of Appeals of Cuyahoga County. Thereafter the plaintiff in error, the Erie Railroad Company, filed a motion in the Supreme Court of Ohio asking said court to require the Court of Appeals of Cuyahoga County to certify its record to said court, but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify its record, and no opinion was rendered by said Supreme Court. Thereupon the judgment of the Court of Appeals became the final judgment of the highest state Court in which a judgment in said cause could be had.

Andrews vs. Virginia Ry. Co., 248 U. S. 272;
Stratton vs. Stratton, 239 U. S. 55.

The facts of the case are in brief as follows:

STATEMENT OF THE CASE.

On September 18, 1920, at Corning, New York, respondent delivered to petitioner a shipment described in the bill of lading as "one box of bedding, one barrel and one box," for transportation to Cleveland, Ohio. The article described as "one box of bedding" was never delivered. It is admitted that the box in question contained household furniture rather than bedding.

As will hereafter more fully appear, the tariff and classifications under which the shipment moved provided for a limitation of liability for the loss of a shipment of household furniture, whereas, no limitation of liability was provided as to shipments of bedding. Respondent claims as damages the full value of the household furniture. Petitioner claims the right to limit its liability.

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household furniture, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10¢ or less per lb., the rates progressively increasing with increased valuation.

Said order of said Commission stipulated among other things:

> "The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shippers Signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as .. cents per pound.'

.....

Shippers Signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted."

At the time of the shipment the respondent did not state the value of the property, nor did the petitioner inquire as to the value. The respondent claims that he told the agent receiving the shipment for the petitioner that the box contained household furniture, but that nevertheless the agent described the shipment in the bill of lading as bedding. This is denied by the agent, who testified that respondent told him the box contained bedding. The charges paid were the basic rate established upon a declared value of not exceeding 10c per pound. This rate was what was known as the "first class" rate and was the same rate as that applying to a shipment of bedding. The respondent claimed damages for the full value of the furniture in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the furniture, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

QUESTION OF LAW TO BE REVIEWED.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply * * *. Second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Court charged the jury as follows, to which your petitioner duly excepted:

> "Now if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package contained, and it was lost or failure to deliver it, *(sic)* then I say to you you should find for this plaintiff."
>
> "Now as to the issue in this case, the first is to determine how and under what conditions were those

goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge."

"In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *"

This view of the law was also taken by the Court of Appeals. It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding, by the agent of the petitioner, when he knew that it was household furniture, preclude the petitioner from limiting its liability.

Your petitioner contends that since this shipment was in fact household furniture, its transportation by petitioner is controlled by the orders, tariffs and classifications applicable to household furniture, and the fact that the agent described the shipment as bedding, even though he did so with full knowledge, is immaterial. Your petitioner further contends that the tariff applicable to shipments of household furniture limited petitioner's liability in this case to 10c per pound, which is the limitation of liability attaching to the rate under which the shipment moved, which rate the respondent paid, and that your petitioner's right to so limit its liability is derived from said Cummins Amendment. This case, therefore, raises a Federal question for the consideration of the Court.

ARGUMENT.

Your petitioner contends that respondent, at the time of the delivery of the shipment to petitioner, was chargeable with knowledge of the provisions of the tariffs and classifications then in effect; that is to say, the respondent was conclusively presumed to know that shipments of household furniture carry rates dependent upon the declared value thereof, and he was presumed to know what those rates were. Therefore, in paying the rate which, as regards household furniture, carried with it a limitation of liability to 10c per pound, based upon a declared value, respondent in law is taken to have made a declaration of value of 10c per pound, and he cannot now be heard to assert a higher valuation. "Having accepted the benefit of a lower rate, dependent upon the specified valuation, respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing." (*American Railway Express Company vs. Lindenburg,* decided by this Court January 8, 1923).

It has been repeatedly laid down by this Court that an agent of a carrier cannot waive the terms of the tariff. The rights and obligations of the shipper and carrier are conclusively determined by the provisions of the filed tariffs. Neither party can depart therefrom by any contract or agreement, nor through any contrary understanding or belief, innocent or otherwise. This is true as to rates, classifications, provisions or concessions of any kind.

American Railway Express Company vs. Lindenburg, decided by the Supreme Court of the United States, January 8, 1923;

Georgia, etc. Railroad vs. Bliss Milling Company, 241 U. S. 190;

Atchison, etc. Railroad vs. Robinson, 233 U. S. 173;

C. & A. R. R. vs. Kirby, 225 U. S. 155.

The claim that the agent knew that the shipment was household furniture but nevertheless described it as bedding in the bill of lading, is immaterial. The knowledge, or lack of knowledge, of either the agent or the shipper concerning either the facts surrounding the shipment, or the terms of the tariff, in no way affects the application of the tariff. This rule has been laid down because making the application of the tariff depend upon the knowledge of either shipper or agent would open the door to abuses and practices which the statutes were intended to prevent, as this Court has repeatedly held.

Respondent, in this case, accepted the bill of lading in which the shipment was described as bedding, when he knew it was household furniture. In so doing he took advantage of a lower rate than he would have paid on a shipment of household furniture if he had declared thereon the value claimed in this action, and respondent, in addition, now claims against the carrier the unlimited liability which attaches to a shipment of bedding. On the plainest principles of fair dealing, this position is untenable, and respondent seeks to justify it on the ground that the agent of petitioner knew of the fraud. We insist that this contention cannot be heard, and that if the judgment below is allowed to stand, then in every case both the shipper and carrier would be permitted to violate the provisions of the tariff by showing that the agent of the carrier had knowledge of such violation.

The trial court charged the jury that plaintiff might recover the full value of the furniture if it found that the agent of the Erie Railroad Company had knowledge of the contents of the box, and this was the view of the Court of Appeals. We insist that this view of the law is manifestly erroneous.

For the reasons urged, therefore, we respectfully submit that the writ of certiorari prayed for should be granted.

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

No. 306.

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MARTIN KIRKENDALL,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO.

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

No. 306.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO.

This was a civil action instituted in the Municipal Court of Cleveland, Ohio, by Martin Kirkendall against the Erie Railroad Company, to recover the claimed value of a shipment of household goods which was lost in transit.

The case was tried to a jury in said Municipal Court and judgment on a verdict was rendered in favor of the plaintiff therein, which judgment was affirmed by the Court of Appeals of the 8th Judicial District sitting in and for Cuyahoga County, Ohio. Thereafter the Erie Railroad Company filed a motion in the Supreme Court of Ohio asking said court to require the said Court of Appeals of Cuyahoga County to certify its record to said court, but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify its record, and no opinion was rendered by said Supreme Court. There-

upon the judgment of the Court of Appeals became the final judgment of the highest state Court in which a judgment in said cause could be had. The case is here on a writ of certiorari to review that judgment.

STATEMENT OF THE CASE.

The facts of the case are in brief as follows:

On September 18, 1920, at Corning, New York, respondent delivered to petitioner for transportation to Cleveland, Ohio, a shipment described in the bill of lading as

"1 Box Bedding,
1 1 Bbl. canned fruit glass,
1 Box canned fruit."

The article described as "one box bedding" was never delivered to the consignee. It is admitted that the box in question contained household goods rather than bedding.

As will more fully appear, the shipment moved under a tariff which, taken in connection with the Cummins Amendment, provided for a limitation of liability of the carrier for the loss of a shipment of household goods, whereas no limitation of liability was provided as to shipments of bedding. The respondent claimed damages for the full value of the household goods contained in said box in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the household goods contained in said box, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply, * * * second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household goods, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10c or less per lb., the rates progressively increasing with increased valuation. (P. 22-23 Record).

Said order of said Commission stipulated among other things:

"The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shippers Signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as .... cents per pound.'

.....

Shippers Signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted." (P. 23-24 Record).

At the time of the shipment the respondent did not state the value of the property, nor did the petitioner inquire as to its value. Respondent claims that he told the agent of the petitioner who received the shipment that the box contained household goods, but that nevertheless this agent described the shipment in the bill of lading as bedding. This is denied by the agent, who testified that respondent told him the box contained bedding. (P. 19 Record)

Because of this misdescription the agent did not inquire as to the value of the property, there being but one rate, known as first class, applicable to a shipment of bedding, and there was therefore no necessity for inquiry as to value. This first class rate was the rate paid by the shipper.

The published tariff of the petitioner as to household goods provided for three different rates, dependent upon

the value of the goods as declared by the shipper, each rate carrying a corresponding limitation of liability on the part of the carrier to the value as thus declared. These rates, as so provided in the tariff, were the first class rate referred to above, the second class rate, one and one-fourth times the first class rate, and the third class rate, one and one-half times the first class rate (Record p. 22). *The charges paid by the shipper were based upon the rate established for a declared and agreed value of the goods not to exceed ten cents per pound, and that rate carried with it a limitation of liability of the carrier to ten cents per pound.*

ERRORS TO BE REVIEWED.

The Trial Court charged the jury as follows, to which your petitioner duly excepted:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package cotained, and it was lost or failure to deliver it (*sic*) then I say to you you should find for this plaintiff." (P. 31 Record).

> "Now as to the issue in this case, the first is to determine how and under what conditions were those goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge." (P. 31 Record)

> "In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *." (P. 32 Record).

This view of the law was also taken by the Court of Appeals (P. 53 Record). It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding by the agent of the petitioner, when he knew that it was household goods, preclude the petitioner from limiting its liability. Your petitioner insists that the charge of the trial court was erroneous and that by reason thereof your petitioner was denied a right, title, privilege or immunity claimed under said Cummins Amendment.

ARGUMENT.

Respondent admits that in shipments of household goods the carrier is authorized to limit its liability and that if, in this case, the goods had been described in the bill of lading as household goods the liability of the petitioner would have been limited to the declared value.

The claim of the respondent (as embodied in the charge of the trial court and in the opinion of the Court of Appeals) is that since the agent of the petitioner knew that the shipment was household goods and notwithstanding described it as bedding, the shipment was subject to the terms of the bill of lading and to the tariff provisions applicable to shipments of bedding, and that such tariff provisions entitled respondent to recover the full value of the shipment. In other words, the claim is that the carrier is bound by a contract, the provisions of which, as applied to the facts of this case, are in violation of the Interstate Commerce Act and the applicable published tariffs, and it is so claimed for the

sole reason that the agent of the carrier had knowledge of such violation.

Your petitioner insists that since the shipment in question was in fact household goods, the tariff applicable to household goods must apply regardless of the acts or knowledge of the shipper or agent of the carrier and regardless of the contract made by them, and since the rate paid by respondent carried with it, as to household goods, a limitation of liability to ten cents per pound, based upon the declared value, the liability of the petitioner is limited to that amount. The tariff provisions embodied in the rate paid determine the whole liability of the carrier. *Atchison, T. & S. F. Ry. vs. Robinson,* 233 U. S. 173. *Western Union Telegraph Co. vs. Esteve Bros. & Co.,* 256 U. S. 566, 572.

The fact that the bill of lading under which the shipment moved described the shipment as bedding and contained a clause to the effect that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment under its bill of lading, including freight charges if paid," does not determine the liability of the carrier. The contract between shipper and carrier does not necessarily control. The essential character of the movement determines the liability of the carrier. *B. & O. S. W. R. Co. vs. Settle,* 43 Sup. Ct. Reporter 28.

The fact that the agent knew that the shipment was household goods, but nevertheless described it as bedding, is immaterial. The knowledge or lack of knowledge of either the agent or the shipper, concerning either the facts surrounding the shipment or the terms of the tariff, in no way affects the application of the tariff. "The rights as defined by the tariff cannot

be varied or enlarged by either contract or tort of the carrier."

Keough vs. C. & N. W. R. R. Co., 43 Sup. Ct. Reporter 47;
Texas & Pac. R. R. Co. vs. Mugg, 202 U. S. 242;
Ks. Southern R. R. vs. Carl, 227 U. S. 639, 653;
Louisville & Nashville R. R. Co. vs. Maxwell, 237 U. S. 94, 98;
Georgia, Etc. R. R. vs. Blish Milling Co., 241 U. S. 190, 197;
Atchison, T. & S. F. R. R. Co. vs. Robinson, 233 U. S. 173;
N. Y. Central R. R. Co. vs. Goldberg, 250 U. S. 85.

In the *Goldberg* case, *supra*, no question of limitation of liability was involved. In that case there was an innocent misdescription of the articles shipped. The carrier contended that it was not liable in any amount because of this misdescription in the bill of lading, relying upon the decisions relating to limitation of liability where goods were shipped at a declared value and rate based upon such value. In deciding the *Goldberg* case, this Court was careful to point out that the cases relied upon to sustain the carrier's contentions were inapplicable because in the *Goldberg* case no valuation was placed upon the goods and no question of limitation of liability to a stipulated value was presented. The court very properly held, therefore, that since there was no provision in the tariff or in the bill of lading exempting the carrier or limiting its liability, the only effect of such misdescription of the character of the goods was merely to impose upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped. It did not affect the

liability of the carrier for failure to deliver the goods. If, in that case, the tariff rate applicable to the goods as actually shipped, had carried with it a limitation of liability to a declared value, any recovery by the shipper would have been limited to the value thus provided for.

In the instant case the applicable tariff rate did carry with it a specific limitation of liability. Any recovery by respondent, therefore, would necessarily be controlled by such limitations of liability as are prescribed by and inherent in the rates established by the published tariff.

It is claimed that because, when the shipment in question was delivered to the carrier, there was no value "declared in writing" or "agreed upon in writing" as provided by the Cummins' Amendment and the carrier's tariff, respondent is entitled to recover the full value of the shipment. The tariff is "in writing," and is an offer of a contract. When a shipper delivers property to a railroad at a certain point for transportation to a certain point, and pays a certain amount of freight money, the shipper's action is an acceptance of this tariff offer, the terms of the contract being determined by the property itself, points of shipment and distance and the rate paid, in connection with the tariff provisions applicable to such a situation. As tariff provisions are "in writing," no error of a railroad employe, particularly if known to the shipper, should be allowed to introduce any preference, discrimination or rebate into the transaction. The shipper is presumed to know the tariff provisions, and in this case he was getting a lower rate than he was entitled to, in view of his present claim as to the value of the household goods. Even if the railroad agent knew the property was household goods, he did not know it was worth more than ten cents per pound, and the ship-

per did. Neither the shipper nor the carrier can avoid tariff provisions by any failure, either knowingly or otherwise, to observe its requirements. The failure, to secure a declaration or agreement of value in writing would not excuse the shipper from the obligation to pay charges according to the character of the goods actually shipped; and if the rate applicable to the goods so actually shipped carried with it a limitation of liability, the shipper is bound by such limitation.

As was said by this Court in *Kansas City Southern Ry. vs. Carl,* 227 U. S. 639-652,

> "When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value."

In legal effect the respondent did agree to a value in writing of ten cents per pound, and he is estopped from asserting any higher valuation since he is chargeable with knowledge of the provisions of the tariffs and classifications then in effect. Respondent was conclusively presumed to know that shipment of household goods carried rates dependent upon the declared value thereof, and a corresponding limitation of liability. *Atchison etc. R. R. vs. Robinson, supra, C. & A. R. R. vs. Kirby,* 225 U. S. 155.

Therefore, in paying the first class rate, which as regards household goods carried with it a limitation of liability to ten cents per pound, respondent in law is taken to have made a declaration of value of 10 cents per pound, and cannot now be heard to assert a higher valuation. In *American Railway Express Co. vs. Lindenburg,* 260 U. S. 584, the contention was made that since the petitioner there did not take from the shipper a written declaration of value, or writ-

ten agreement as to value, signed by him, the respondent was entitled to recover the full value of the goods shipped. The form of receipt given by the petitioner in that case contained a stipulation that in consideration of the rate charged, which was dependent upon an agreed valuation, not exceeding fifty dollars for shipment of one hundred pounds, or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, the shipper agreed, unless a greater value be declared at the time of shipment, that the company would not be liable in any event for more than that amount. The form of receipts which the express companies are authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. It was contended that since the shipper had not signed this receipt that there was no written agreement or declaration of value, as required by the Cummins' Amendment. Answering this contention, this Court said:

> "Neither the statute nor the order of the Commission requires the signature of the shipper. * * * Naturally such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. *Bills of Lading,* 52 I. C. C. Rep. 681, where it is said:
>
> 'It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading.' "

The fact that in that case the value was specified in the receipt is immaterial. In the instant case, respondent accepted the benefits of a lower rate dependent upon a limitation or agreement as to value as specified in the published tariff. The distinction is immaterial, since respondent must be taken to have assented to the terms of the tariff and was bound thereby. Respondent in this case accepted the bill of lading in which the box in question was described as bedding when he knew it was household goods. Having accepted the benefit of a lower rate dependent upon the specified valuation respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing.

This Court has repeatedly held that it was the purpose and intent of Congress, by the enactment of the various statutes regulating carriers, to definitely and permanently end the serious abuses arising from unfair discriminations and preferences, by establishing the published tariffs as the sole and absolute standard for determining the rights and liabilities of shippers and carriers in the transportation of property. And this Court has therefore steadfastly declined to permit any departure from this established standard, notwithstanding the many and ingenious devices and claims which have from time to time been urged as constituting grounds for exceptions thereto. This case is but another attempt to persuade this Court to modify this inflexible rule, and if successful would be but an entering wedge the effect of which would be to destroy this structure which Congress and this Court has so painstakingly constructed.

As is said by this Court in the *Lindenburg* case, *supra,* quoting from the case of *Kansas City Southern Ry. Co. supra,*

> "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward under valuations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The trial court charged the jury that plaintiff might recover the full value of the goods if it found that the agent of the Erie Railroad Company had knowledge of the contents of the box, and this was the view of the Court of Appeals. We insist that this view of the law is manifestly erroneous.

For the reasons urged, therefore, we respectfully submit that judgment complained of should be reversed.

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

No. 1018.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION for WRIT OF CERTIORARI.

E. P. CHAMBERLIN,
DUDLEY K. HENDERSON,
Attorneys for Respondent.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

On the 18th day of September, 1920, respondent, Martin Kirkendall, delivered to the petitioner, The Erie Railroad Company, at Corning, New York, two boxes and one barrel for shipment to Cleveland, Ohio. Respondent told the freight agent at the time of shipment that one box contained two pillows, the barrel contained canned fruit and the other box contained miscellaneous household articles with a quilt and blanket around them. The freight agent then stated he would bill the box as bedding.

When respondent called for these packages at Cleveland, Ohio on or about the 24th day of September, 1920, the box which was described in the bill of lading as "one box of bedding," was missing, and was not delivered to him. It can be admitted that the freight agent should have billed the box as household articles instead of bedding.

Petitioner in their statement of the case, refer to this box as containing "*household furniture,*" though as a matter of fact, it contained miscellaneous household *articles,* and not a single piece of furniture.

An action was then instituted in the Municipal Court of Cleveland, Ohio, by respondent, to recover the value of the shipment which was lost in transit, the jury returning the verdict for plaintiff in the sum of Three Hundred Eighty-six Dollars and Ninety Cents ($386.90).

The contention of the petitioner is that there should have been a declared value or an agreed value of the goods at the time of shipment. The facts show that the respondent did not state the value of the property or that he was asked to do so; nor was there any provision in the bill of lading limiting the carrier's liability beyond the actual value of the goods. Petitioner states in page 11 of their brief, that the agent testified that respondent told him the box contained bedding. However, reference to the Record clearly shows that the agent did not remember accepting the shipment except from his shipping records.

The Railroad Company then instituted error proceedings in the Court of Appeals which affirmed the decision of the lower court. They then filed a motion in the Supreme Court of Ohio to have the Court of Appeals certify its record, which motion was denied.

ARGUMENT.

As set forth in the brief of Petitioner, it is the claim of the respondent that he is entitled to recover the actual value of the articles contained in the missing box if the freight agent, even though knowing their true contents, improperly or incorrectly accepted and billed the box under a wrong classification, especially since the bill of lading contains a provision that the Railroad Company was liable for the actual value of the property at the time and place of shipment and contained no statement limiting its liability.

The Railroad Company in this case have attempted to avoid liability for its own negligence and want of care. It was solely through the carelessness and negligence of their freight agent that this box was not shipped as "household articles." The Railroad Company in its petition for writ of certiorari, claim that the decision of the courts was against a right, title or immunity claimed by them. As a matter of fact, there is not a single decision or ruling of this Court or any other court supporting their contention, all of the decisions supporting the contention of this respondent. The Railroad Company in their brief, refer to the case of *The American Railway Express Company vs. Lindenberg* decided by this Court, January 8th, 1923, as being in point, but in that case *"the charges paid were on the basis of the limited liability set forth in the receipt."* As hereinbefore pointed out, no such statement was set forth in the bill of lading. In fact, the bill of lading expressly stated:

> *"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the time and place of shipment under its bill of lading including freight charges if paid."*

The receipt or bill of lading in the *Express Company vs. Lindenberg,* further stipulated that in no event "shall this company be held liable or responsible nor shall any demands be made upon it beyond the sum of fifty dollars upon any shipment of one hundred pounds or less and for not exceeding fifty cents per pound upon any shipment weighing more than one hundred pounds and the liability of the Express Company is limited to the value above stated unless a just and true value is declared at the time of shipment and the declared value in excess of the value above specified is paid for or agreed to be paid for under this company's schedule of charges for excess value." No such provision or even similar provision appears in the bill of lading given to the shipper in this case, so clearly the *Express Company* case is not in point.

In the case of *The Union Pacific Railway Company vs. Burke,* decided by this Court February 28th, 1921, Mr. Justice Clarke pointed out that where the bill of lading contained among other conditions a statement that the carrier was liable for any loss or damage computed on the basis of the value of the property and where no lower value had been represented in writing or agreed upon, that the shipper had the right to rely on this clause as to the limit of liability of the carrier. This Court also points out in that case "this Court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contract for exemption from the consequences of its own negligence or that of its servants."

Section 7884 of the Federal Code, relative to the regulations of the Interstate Commerce Commission. provides, among other things, *that it is the duty of all common carriers* to establish, observe and enforce just

and reasonable classification of property for transportation and of other matters relative to, and in connection with, receiving, handling, transporting and delivering property. It is not claimed that that would be the duty of a *shipper.*

It is also made the duty of the carrier to refuse to accept goods not properly packed nor properly classified, and it even provides a penalty on the *carrier* if this is not done, and where the carrier does accept goods improperly packed, it is liable for damage to the goods.

> "The carrying of goods manifestly not properly packed, the carrier must pay for damage, as it has failed to exercise its right to refuse to transport goods defectively packed."
>
> *Moore on Carriers,* page 559.

This same doctrine would be applicable to shipping goods not properly classified.

> "A carrier classifying goods received for shipment with knowledge of their character, and collecting the freight under such classification cannot avoid the contract or its liability for failure to ship according to the contract on the ground that the goods did not belong to the class named."
>
> *St. Louis Railway Company vs. The Cash Co.,* 161 Ala., 332;
>
> *Michie on Carriers,* Volume 1, page 427.

In this case, the shipper told the freight agent exactly what the missing box contained, and the law, as frequently decided by the courts, holds that where a shipper is guilty of no deception or negligence, or even where a misdescription was not intended to deceive, that the carrier is liable for the value of the goods lost.

> "Where the words 'contents unknown' are written above the signature to a bill of lading for

cases of domestics, one of which is not delivered, the shipper, on proving that the lost case contained silk goods and not domestics, may recover its value *where the misdescription was not intended to deceive* and it is not pretended that a knowledge of the true contents would have induced a higher freight or greater watchfulness."

Fasset vs. Ruark, 3 La. Ann., 694.

Also:

"Where a shipper of cigars not corded and sealed on which the freight rate was higher than on smoking tobacco, described by the shipper as 1 c/c tobacco, but was guilty of no fraud, deception or negligence which would have misled the carrier to accept the shipment at less freight than he was entitled to receive, he was entitled to recover for loss of the shipment, the value of the actual articles lost, with the freight paid."

Jenkins vs. Atlantic Coast Co., 66 S. E., 407; 84 S. C. 520.

It has been repeatedly held that even where a carrier misquotes a rate, the shipper suffering damage may recover full compensation. This would be true even though the tariffs as published were accessible to the shipper.

"The act of 1910, unchanged in 1920, provides a penalty against the carrier for giving a shipper the wrong rate. As the Statute in Section 8 gives a shipper the right to recover damages for any violation of the Act, it is believed that upon requesting a quotation of a rate as the Statute requires, *the shipper suffering damage in consequence of an erroneously stated rate, may recover damages in any court of competent jurisdiction.*"

Watkins on Shipper and Carrier, Volume 1, page 304 (1920).

The Railroad Company claim that if the box contained household goods, then the freight agent was under the law bound to refuse the shipment unless the value was declared. They claim that the knowledge of the agent as to the contents of the box is wholly immaterial. The Railroad Company in their brief filed in the Supreme Court of Ohio, go even further and state that their agent had no right and that it was *illegal* for him to accept the goods without a declaration of their value.

If the agent did anything illegal, can that be held to be an excuse on the part of the carrier to avoid liability? It may have been against the provisions of the Interstate Commerce Act for the Railroad Company's agent to accept and ship the box in question, *but the fact remains that the agent did accept and ship it under, what the Railroad Company claim was the wrong classification, though knowing its true contents.*

We admit that if respondent had declared the value of the goods at the time of shipment and they had been shipped under that rate, then he could not recover over that declared value. But no value of the goods was declared nor was respondent asked to do so.

> "The bailor is not bound to state the value of a package delivered to a carrier, unless inquiry is made."
>
> *Phillips vs. Earle,* 25 Mass. 182.

As herein before set forth even the bill of lading in this case provides that it is subject to the conditions written thereon, among which is the following:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under its bill of lading, including the freight charges if paid."
>
> *Petitioner's Exhibit "A."*

Petitioner herein cites a few cases as supporting their contention, which are undoubtedly the law, *but not one of which is in point here.* These citations, including *Georgia, etc., Railroad vs. Bliss Milling Company,* 241 U. S. 190; *Atkinson, etc., Railroad vs. Robinson,* 233 U. S. 173, and *C. & A. R. R. vs. Kirby,* 225 U. S. 155, hold that the freight rates as set forth in the Interstate Commerce Act are as binding upon the shipper as upon the carrier. This is correct.

All these cases are similar to the case of the *Pierce Company vs. The Wells Fargo Company,* 263, U. S. 278, (not cited by petitioner), wherein the shipper deliberately and purposely shipped four automobiles and accepted a receipt which showed on its face a limited liability in the total sum of fifty dollars. Naturally, it was held he could not recover beyond the liability shown in his receipt, but this case is no more in point than the others above mentioned. Most of the cases cited by petitioner have arisen over disputes of freight rates or from unjust discriminations to shippers in the matter of rates and refunds.

The charge of the trial court, Judge McMahon, pages 70 and 71, of the Record, is a fair and just statement of the law:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant Company and that at the time he in no manner misled the Company, made no misrepresentations, actually told the defendant Company through its Agent, just what the packages contained, and received a bill of lading for it, was accepted upon the part of the Railroad Company, knowing what that package contained, and it was lost or they failed to deliver it, then I say to you, you should find for this plaintiff."

We contend that where the shipper as in this case, with no thought in mind of securing a cheaper freight rate, but who honestly and fairly told the freight agent what the box contained, and even if the agent improperly and incorrectly shipped the box under the wrong classification, that the Railroad Company cannot avoid its liability for its own carelessness and negligence.

The finding of the Court of Appeals in affirming the judgment of the Municipal Court was clearly correct as to the law as applied to the evidence. Judge Vickery stated:

> "There is nothing in the record of this case to show any collusion or fraud was entered into between the agent of the Railroad Company and the shipper. There is some dispute in the record as to whether the shipper told the agent just what the box contained, but the Court submitted that question fairly to the jury under a charge that, if they had not communicated to him what it contained, he would not be entitled to recover. There is nothing in the record to show but what the Railroad Company classified this box of goods itself, and it is admitted that, according to the classification, they paid the regular freight on such classification. That it contained other things besides bedding, is clearly proven in this case, but we think from the whole record and from the verdict of the jury under a proper charge by the Court, whatever was in that box was there with the full knowledge of the Railroad Company through its agent, and there is no fraud, collusion or negligence charged in any way, and the proof shows that the goods were valued at least the amount of the verdict of the jury, and we do not see under the circumstances, why the plaintiff would not be entitled to recover under the bill of lading that is given in this case.

It must be remembered that the shipper was nowhere called upon to place a value upon these goods, and, under the circumstances of this case it seems to us he was entitled to recover the full value.

We do not deem it expedient to discuss the various questions that were raised by the brief of plaintiff in error, because we do not think they apply with much force to this case.

Taking the whole record together, we do not find any error which would warrant us to reverse the case and the judgment is, therefore, affirmed."

Ingersoll and Sullivan, J.J. concur.

Respondent respectfully contends that petitioner is not entitled to the writ of certiorari prayed for,

1st. Because if the goods were shipped under the wrong classification, it was solely through the carelessness and negligence of the petitioner's agent.

2nd. Because that in any event their bill of lading did not provide for limited liability but in fact expressly stated that the Railroad Company would be liable for the actual value of the goods at the time and place of shipment.

Respectfully submitted,

E. P. CHAMBERLIN,

DUDLEY K. HENDERSON,

Attorneys for Respondent.

ERIE RAILROAD COMPANY v. KIRKENDALL.

CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF OHIO.

No. 51. Argued October 8, 1924.—Decided November 17, 1924.

1. A petition for certiorari must give adequate information concerning the record and essential facts. P. 185.
2. When the case presented upon argument differs radically from the one tendered by the petition upon which certiorari was granted, the writ will be dismissed. P. 186.

Writ of certiorari dismissed.

CERTIORARI to a judgment of the Court of Appeals of the State of Ohio affirming a judgment recovered by the above-named respondent against the Railroad for goods lost in transit.

Mr. Benjamin D. Holt and *Mr. Edward A. Foote* for petitioner.

Mr. Dudley K. Henderson, with whom *Mr. E. P. Chamberlin* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent sued for the value of a lost package described by the bill of lading as "1 box bedding," weighing 280 pounds, which actually contained "miscellaneous household articles, together with two quilts and two pair woolen blankets." In defense the railroad insisted that he misrepresented the true character of the contents and thereby prevented it from obtaining a released valuation which, according to the rate paid and provisions of the published tariffs, would not have exceeded twenty-eight dollars.

The writ must be dismissed. The inducing petition failed to give adequate information concerning the record

and essential facts. *Furness, Withy & Co.* v. *Yang-Tsze Insurance Assn.*, 242 U. S. 430; *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508. The confused state of the record renders it difficult to ascertain the facts; maybe impossible. The petition for certiorari seemed to represent that at time of shipment the consignor accepted a bill of lading misdescribing the contents of the package and accepted a rate based upon limited liability, as he must have known.

It appears, however, that the shipper correctly reported the contents to the railroad, that he was not asked concerning value and made no representations relative thereto, that no rate was quoted, and that the undisclosed charges were to be collected at destination. The bill of lading contained no statement of value or rate and no provision restricting the carrier's liability to less than the actual worth. Section 8 provides—"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." *New York Central R. R. Co.* v. *Goldberg*, 250 U. S. 85, 87.

The case tendered by the petition is radically different from the one presented upon the argument.

Writ of certiorari dismissed.